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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA:
WITH SELECT CASES,
RELATING CHIEFLY TO POINTS OF PRACTICE,
DECIDED BY
THE SUPERIOR COURT OF CHANCERY
FOR
THE RICHMOND DISTRICT.

VOLUME III.

BY WILLIAM W. HENING AND WILLIAM MUNFORD.

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DISTRICT OF VIRGINIA, TO WIT:

BE IT REMEMBERED, That on the twenty-second day of January, in the thirty-fourth year of the Independence of the United States of America, **WILLIAM W. HENING** and **WILLIAM MUNFORD**, of the said district, have deposited in this office the title of a book, the right whereof they claim as authors, in the words following, to wit:

"Reports of Cases argued and determined in the Supreme Court of Appeals of Virginia: with Select Cases, relating chiefly to Points of Practice, decided by the Superior Court of Chancery for the Richmond District. Volume III. by William W. Hening and William Munford."

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WILLIAM MARSHALL,

(L. S.)

Clerk of the District of Virginia.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

At the Term commencing in October, 1808.

IN THE THIRTY-THIRD YEAR OF THE COMMONWEALTH.

JUDGES, PETER LYONS,(1) ESQUIRE, *President.*
WILLIAM FLEMING, ESQUIRE.
SPENCER ROANE, ESQUIRE.
ST. GEORGE TUCKER, ESQUIRE.

ATTORNEY-GENERAL,

PHILIP NORBORNE NICHOLAS, ESQUIRE.

*Dew against the Judges of the Sweet Springs
District Court.*

*Thursday,
October 13.*

SAMUEL DEW, the appellant, on the 12th day of *June*, 1805, obtained from the General Court a rule upon the Judges of the *Sweet Springs* District Court, to shew cause why a *mandamus* should not issue, directing them to *admit* him to the office of Clerk of the said District Court; to which rule a return was made, "that, at a Court held for the said District, on the 18th day of *May*, 1805, *Samuel Dew* pro-

The writ of *mandamus* is the proper remedy to restore a Clerk ousted from his office by the illegal appointment of another person.

If the original rule be to shew cause wherefore a

(1) Judge LYONS was absent the whole of this term, having been prevented from attending by indisposition.

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mandamus shall not issue to admit the Clerk; the subsequent rule, or the *mandamus* founded thereon, may nevertheless be to restore him to the said office; for such rules may be changed and modified so as to square with the rights of parties, and attain the real justice of the case.

The person occupying the office ought to be made a party to the rule, or to the conditional *mandamus*, or such rule or *mandamus* ought to be served upon him, so as to enable him to defend his right before the peremptory *mandamus* issues. But, if it appears from the record that he was apprised of the proceedings and defended his right, it is sufficient.

A person appointed Clerk of a District Court by the Judges of the General Court in vacation, has the whole of the ensuing term of the District Court to give the bond and security required by law.

In such case a certificate that S. D. is appointed Clerk, &c. signed and sealed by a majority of the Judges of the General Court, (*without styling themselves such*), is a sufficient commission and need not run "in the name of the Commonwealth," nor mention that the vacancy happened between term and term, nor state the tenure of the office.

In judging of the sufficiency of securities, their real as well as personal property should be considered.

duced in Court a commission, signed by a majority of the Judges of the General Court, appointing him Clerk of that District Court, in the room of *Samuel Dew*, senior, deceased; also a certificate from the Clerk of *Botetourt* Court, of his having taken the oaths prescribed by law; but, not offering sufficient security for the faithful performance of the duties of the said office, the Court proceeded to appoint *Erasmus Stribling* to fill the said office, who, having taken the oaths, as the law directs, together with *James Breckenridge* and others, his securities, entered into bonds, &c. with such condition as the law requires:— and, at a District Court, continued and held as aforesaid, on the 22d day of *May*, 1805, *Samuel Dew* this day appeared in Court, and offered sufficient security for the performance of the duties of the office of Clerk of the said Court, of which the Court took time to consider:—and, at a Court continued and held as aforesaid, the next day, the said *Samuel Dew* was refused to be admitted to the said office of Clerk, because, on the first day of the term, when called upon to execute a bond, he offered insufficient security, although the greater part of that day was allowed him to provide security, and, previous to the appointment of *Erasmus Stribling*, said *Dew* acknowledged he was unable to find farther security on that day, but then alleged that, at a future day of the term, it was probable he would be able to obtain sufficient security,

The commission, and certificate from the Court of *Botetourt* County, within referred to, are in the following words, to wit, 'These are to certify that *Samuel Dew* is appointed the Clerk of the District Court, to be holden

“at the *Sweet Springs*, in the County of *Monroe*, in the
 “room of *Samuel Dew*, senior, deceased. Given under
 “our hands and seals this 23d day of *January*, in the
 “year of our Lord one thousand eight hundred and five.

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“*Richd. Parker*, (Seal.) *Jos. Prentis*, (Seal.)

“*Wm. Nelson*, jun. (Seal.) *Francis T. Brooke*, (Seal.)

“*Jno. Tyler*, (Seal.) *Jos. Jones*, (Seal.)

“At a Court holden for the County of *Botetourt*, on
 “*Thursday*, the 12th day of *February*, 1805, *Samuel Dew*,
 “gentleman, produced in Court an appointment signed by
 “six of the Judges of the General Court, appointing him
 “Clerk of the District Court holden at the *Sweet Springs*,
 “whereupon the said *Samuel Dew* took the oath of fidelity,
 “the oath to support the Constitution of the *United States*,
 “and the oath of said office.

“*Teste.* H. BOWYER, C. B. C.

“A Copy, *Teste.* ERASMUS STRIBLING, C. S. D. C.’

“We consider it was the duty of the Judges to hold a
 “Court on the first day of the term, and find that the civil
 “and criminal business of the country required it; that
 “*Samuel Dew*, who was commissioned in the month of
 “*January* preceding, had sufficient time to have procured
 “security, without which he well knew he could not act;
 “that, circumstanced as the Judges were, they could not
 “proceed to elect a Clerk *pro tempore*, and they would not
 “have been justified in respecting the declaration of the said
 “*Samuel Dew*, that it was *probable* he could get security at
 “a future day, considering his failure for several months,
 “and the first day of the Court, when and where a large
 “number of the people of the District were present. We
 “consider, therefore, that the Judges of that Court acted
 “correctly and properly in the appointment of *Erasmus*
 “*Stribling*, who fully answers their expectations and those
 “of the public. Signed by the Judges present, and attest-
 “ed by *Erasmus Stribling*, C. S. D. C.”

At the ensuing term of the General Court, the rule enter-
 ed at the last term was continued till the next Court; and,
 by consent, as well of the said *Samuel Dew*, as of *Erasmus*

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Stribling, commissions to take depositions were awarded them : and afterwards, on the 15th of *November*, 1906, the Court, having read the evidence and maturely considered the return on said rule, ordered, that "unless the defendants "shew cause at the next term why the plaintiff shall not be "admitted to the office of Clerk of the said District Court, "a *mandamus* will be then awarded, to the Judges of the "said Court to be directed, commanding them to admit the "said *Dew* to the office aforesaid. The right of appeal is "nevertheless reserved, in case the *mandamus* aforesaid "shall be awarded." To this order another return was made, substantially corresponding with the former ; and on the 13th day of *November*, 1907, "at a General Court continued and held, &c. came the parties by their attorneys, "who being fully heard, and the returns, on the said rule, "by the Court maturely considered, it was ordered that "the said rule be discharged ;" from which order *Dew* appealed to this Court.

The depositions filed ~~and~~ read in the cause were very numerous, but need not here be detailed, as the whole, taken collectively, did not materially vary the merits of the case. It is proper, however, to mention that the *real property* of those persons who were offered by *Dew* as his securities, on the first day of the District Court, was not counted as any part of the sum which the law required ; or, at least, the Court made inquiry as to their *personal property* only : but it does not certainly appear from the depositions, that the persons offered were sufficient security, even if their *real* as well as *personal* property had been taken into computation.

As this case concerned the public administration of justice, and a speedy decision was, therefore, considered necessary, it was taken up, out of its turn on the docket, upon a petition from the appellant.(a)

(a) See rule of the Court of Appeals, bearing date May 5th, 1906, 1 *Hening and Manford*, iii.

Wickham, for the appellant, contended, that *Dew* had a right to give security at any time during the first session of the District Court after his appointment. The language of

the law(a) is, not on the first day of the first session, but AT the first session, which necessarily gives the whole of the session for the purpose. Having received his commission and taken the oaths, Dew was qualified to perform the duties of his office, and was Clerk *de facto*, though it was incumbent upon him to give security before the final adjournment of the Court. If he failed to do so, the only remedy against him was by an information in the General Court, for holding the office without complying with the law requiring him to give security.

Sound reason supports this construction: for sickness, or other inevitable accidents might prevent the Clerk, appointed in the vacation, from attending on the first day; he might be disappointed by the persons who had promised to be his securities; or, he might think securities good whom the Court might adjudge insufficient. In any of these events, surely some time ought to be allowed him.

No argument to the contrary can be drawn from the inconvenience of granting this indulgence; since the Clerk could legally execute the duties of his office before he gave the bond; and, when given, it would cover all his previous transactions: if not, the law has not provided for the case.

The provision concerning County Court Clerks,(b) that they must give bond "at the time of appointment and qualification," furnishes an argument to ascertain the true construction of the law now in question. When the Legislature uses different language on similar subjects, its intentions must be inferred to be different: but, where the words used are the same, the same construction ought to prevail. In the clause relative to setting aside office-judgments,(c) the words "at the succeeding Court," have always been understood, at any time during the succeeding Court. Between that case and this, there is no difference in principle.

But, if security was not given, it was the fault of the Court, which improperly confined its inquiries to the personal property of the persons offered; notwithstanding the greater certainty and permanency of landed estates. This might have prevented Dew from offering men whose real

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(u) Rev.
Code, 1 vol.
c. 66. s. 13.
p. 75.

(b) Rev.
Code, 1 vol.
c. 70. s. 5.
p. 94.

(c) Ibid. c.
66. s. 28.

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property was abundantly adequate ; for no inference can be drawn from the record but that, if the Court had decided correctly as to that point, security might have been given on the first day.

Dew ought, therefore, to be restored to his office ; and the proper remedy is by writ of *mandamus*, as in the case of *Smith v. Dyer*, 1 *Call*, 562. *British* authorities do not bear on this subject. In *England* the remedy by *Assise* is obsolete, and that by information in the nature of *quo warranto* substituted. (a) But this is by virtue of the stat. 9 *Ann.* c. 20. (b) which is not in force in this country. The writ of *mandamus* is the mode of proceeding in this country, and the only remedy by which a person, illegally ousted of an office, can be put into possession ; in which respect, it is analogous to the action of *detinue*, or to a bill in *Chancery* for specific performance. To deprive us of the *mandamus*, the counsel on the other side must shew that we have some other specific remedy.

(a) See the
opinion of
Judge Buller,
in *Rex v. the
Bishop of
Chester*, 1
Term Rep.
404.

(b) Recited
in *Bac. Abr.*
tit. *Manda-*
mus, letter K.

Chapman Johnson, for the appellees.

1. The remedy by *mandamus* was not the proper remedy in this case.

(c) *Bac.*
Abr. Gwil. ed.
tit. *Manda-*
mus, letter A.
(d) 3 *Term*
Rep. King v.
Joppe.

"The writ of *mandamus* issues to command the execution of an act where otherwise justice would be obstructed, (c) "and, therefore, only where a person has no other specific remedy." (d) Now, in this case, there is another specific remedy ; and that is an information in the nature of *quo warranto*. Wherever an office is improperly held, an information in the nature of *quo warranto*, goes against the person, and puts his right fairly in issue. But if *Stribling's* title be decided on a *mandamus*, he is barred without being heard ; for the *mandamus* goes to the Judges, not to him, and, if their return had not been true, he could not traverse it, because he was not a party ; neither could the Judges be considered as his agents. The information in the nature of *quo warranto*, is not founded on stat. 9 *Ann.* c. 20. but on the common law ; for the statute applies exclusively to

Corporations, and did not originate, but only reformed the proceedings in *quo warranto*.

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It may be said, that where the person in possession of an office has only a *colourable* title, the *mandamus* may issue ; but it is questionable whether that distinction is not overruled by 2 *Term Rep.* 259. *The King v. The Mayor of Colchester*.

If Dew has any claim founded on his allegation that he is entitled to the office, and has qualified according to law, his remedy should be by a *mandamus* to restore not to admit. The distinction between these two species of *mandamus* is shewn in 3 *Term Rep.* *King v. Jopper*. Dew might also try his title to the office by an action for the *mesne* profits : and the Court would lean against the *mandamus* and leave him to his action, or to try his title by a *quo warranto*.

It has struck me, there is another remedy in this case. A *judicial* question was presented to the Judges of the District Court, who made the appointment, and their error, if they committed one, should have been corrected by an appeal, writ of error, or *supersedeas*. The case of the probate of a will, or granting letters of administration, is similar to this. In that case, if the Court do wrong, an appeal may be taken, or a writ of error lies. In *England*, a *mandamus* is the only remedy to compel the ORDINARY to admit an executor or administrator, because, *there*, no writ of error lies to the ORDINARY ; and, *e converso*, there is no such remedy here as the *mandamus* to an inferior Court to compel the probate of a will or the granting of administration, because this Court has other means ; by writ of error, &c. A *mandamus* is never issued, in *England*, to correct the error in a Court of Record ; but only to compel it to act. Here is an application to correct the error of a Court of Record by *mandamus*.

2. On the *merits*, I differ with Mr. Wickham as to the construction of the act of Assembly. Every statute must be construed according to its policy and intention, which, in this case, were, that a Clerk should be appointed, and should give ample security. The giving security was per-

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mitted to be deferred until the meeting of the Court, only because, the appointment being in vacation, the Judges could not *then* conveniently meet to consult about the security and to receive it. The argument drawn from the County Court law, makes in our favour. That law requires the County Court Clerks to give bond and security at the time of their appointment, because the appointment is made in *Court*, not in *vacation*. The fair inference is, since it is not practicable (when a District Court Clerk is appointed in *vacation*) for his bond and security then to be received by the Judges; and since the law says he shall give them at the next Court; that, in both instances, the Legislature intended the same thing; viz. that bond and security should be given at the first *practicable* moment; that is, at the *commencement* of the Court; and not that the Clerk should have an estate in the office before he should give security. The giving security is intended as a condition *previous to his getting the office*; and the reasonable construction is, that he is not at liberty to perform its duties until the condition be complied with. At what point of time shall he stop, if not arrested at the commencement? The law, indeed, says "*thenceforth*, (that is, from his "qualification,) he may exercise the duties of his office:" but this could not mean, *thenceforth during good behaviour, without limitation*, but only *thenceforth till the next Court*. If the whole term were allowed, and security should not be given, there is no express authority in the law to make another appointment at the next term. If such appointment might be made, yet, by going on in the same manner, the duties of the office might always be performed by persons who had not given security. At any rate, the Judges ought to have had a discretion to allow a *reasonable time*; not the *whole term*. Now, in this case, a reasonable time was allowed, between *Dew's* appointment and the commencement of the Court; and after the Court met, the Judges waited until the afternoon of the first day. Parol evidence is not admissible to contradict what they have stated on the record, unless their return was merely a

ministerial act. But the facts in this instance, must be considered as *judicially* stated, because the parties were in Court, and the decision concerning the rejection of the security was a *judicial act*, and entered of record. So, if bail be offered, and the Court refuse it, and spread on the *record* their reasons, parol evidence cannot be admitted to contradict it. Yet, even the depositions do not shew that the Court did wrong in any respect; for, according to what the securities who were then offered *now say* concerning the value of their property, both real and personal, they were worth, in all, only 4,529*l.* 1*s.* The law requires ten thousand dollars: the Clerk's office may last for *life*: could this Court then think this security sufficient, when divided among *five* persons, the greater part of whose property consisted of *lands*, when, it is well known, that under the laws of this country, *lands* are very insufficient security? It is said the Court did not take the *lands* into consideration: but, even if that had been made a formal point before the Judges of the District Court, (which it was not,) yet shall *Dew* have a *mandamus* when it appears that he offered security which, upon his own principles, was insufficient? He ought to have offered other security; the error of the opinion, if there was one, should not have prevented his doing so.

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—

Wirt, on the same side. The rule against the Judges was to shew cause why a *mandamus* should not issue to admit *Dew* as Clerk. The only questions before the General Court were, whether the rule should be discharged, or the *mandamus* issued in the form mentioned in it. The question *here* is, did he make out a case for a *mandamus*, to admit him without farther ceremony.

This was an application to the *discretion* of the General Court; for a *mandamus* is not a writ to be issued *of course*; but the Court ought to be satisfied that they have good grounds for granting it. (a)

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—

(a) 4 Bac.
Abr. Guil. 3
edit. 496.
Term Rep.
651.

Was there any ground, for a *mandamus* to admit, in this case? *Dew* had not only no *legal right* to that clerkship, but another person had the *right* and *possession* of the office.

1. He had not a *legal right*; without which there was no ground for a *mandamus*; for an *equitable* right is not sufficient.(a)

When he moved for the *mandamus*, his own statement shewed, that he had not a consummated legal right. It is admitted by his counsel, that the bond was to be given at the first term. Was this done? Certainly not; for the *delivery* of a bond is an essential part of it, and even a *tender* is not sufficient. If he was injured by the Court's refusal, he should have obtained a *mandamus*, not to admit him to the office, but to compel the Court to receive his bond and security. The *mandamus* ought to apply to the first obstruction to his title, as in the case before cited from *Burrow*. If he had got the peremptory *mandamus* to admit him, what would have become of the bond and security? The District Court could not have required it; neither could the General Court have so shaped the *mandamus* as to insert a condition that he should be admitted upon his giving bond and security: for this was not in the rule; and a *mandamus* may be superseded, if it does not follow the rule on which it is founded.(b)

(b) 2 Str. 879.
Rex. v. Wild-
man. 3 Mod.
209.

Authority and reason both require, that the *mandamus* should strictly conform to the *rule*, the intention of which is to apprise the defendant what sort of *mandamus* is demanded: and in this there is no hardship; since *Dew*, or his counsel, might have taken a rule for a *mandamus* to admit him, upon his giving bond and security. A serious difficulty, as to the right of *Dew*, arises under the act of Assembly. Bond and security is to be given at the first Court. Is there any discretionary power in the *Judiciary* to receive the bond afterwards, under that commission? This may be a hardship; but a *casus omissus* by the Legislature is only to be deplored, not remedied by the Courts.

But, supposing it was the duty of the Court to have moulded the rule to suit *Dew's* grievance, did he shew any grievance? This involves two questions.

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The first is a question of fact: did he tender bond and *sufficient* security at the time required by the Court. The second is a question of law: could he compel the Court to receive it at any subsequent day?

As to the first of these questions, the record says he did not; and its truth cannot be impeached by parol evidence. I will submit another point to the court; whether the order of *November 15*, 1806, is not, in substance, the *conditional mandamus* spoken of in the law. If so, the return was conclusive *as to the fact*, and could not be contradicted, because no process was intended to intervene between this and the *peremptory mandamus*. If not, the return of the Judges, being controverted, ought to have been *traversed*, and tried by a Jury.

As to the second question, my impression of the law is, that the first thing to be done, on opening the Court, was the qualification of the Clerk. It is said that "*at the first session*," means *during* the first session. Let it be granted: yet he had not his election *at what time*, during the session, he shall give bond and security. Even admitting he had that election, the Court could restrict him so far as to call for the bond before he should do any duties.

A statute, *pro bono publico*, ought to be construed, so that it may, as far as possible, attain the end proposed. (a) If the bond were given on the last day of the Court, would it operate retrospectively, and cover any misconduct during the previous part of the term? The obvious meaning of the law seems to be otherwise. Its object would be defeated by the construction, that bond and security may be given at the end of the term. If, at the end of the term, *Dew* had said that he could not give bond, would the Court have done its duty to the Commonwealth? He would have sported with the public interests nine or ten days, and there would have been no remedy.

(a) 6 Bac.
Abr. Gwill.
edit. 388.
1 Str. 253 3
Co. Reb 7. b.

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(a) 6 *Bac. Abr.*
(*Civil. edit.*)
391.
(b) *Ibid.*

Another rule of construction is, that no statute should be construed so as to be inconvenient and against reason: (a) and, moreover, such a construction should be put upon a statute as does not suffer it to be eluded. (b) Suppose the Court had indulged *Dew* until the end of the term, and he had altogether failed to give bond, would he not have been acting, until then, without security, and have *eluded* the law? Even if he had his option, as to the day, under the words of the statute, the Court might controul that option, in order to accomplish the *intention* of the statute, which is the public good. According to 6 *Bac. Abr.* 379. (*Civil. edit.*) the word "*may*" has been construed to signify "*shall*," in order to accomplish the intention and object of a law; and the Courts, pursuing the intention, have enlarged, narrowed, and opposed expositions of statutes. (c)

(c) 6 *Bac.*
386. *Plowd.*
405.

What would you have had the District Judges do? The Court had met: the people had assembled to do business. Criminals were to be tried. The Clerk, who had held his commission from *January* until *May*, was not ready with security. Time was allowed him: the business of the Court was suspended: he still failed to give security. Should the Judges have let him spin out the term, and delayed business farther, or suffered him to act without security; entrusting to him the public property and interests, without the guarantee intended by law?

The conclusion is, that the Judges acted correctly in requiring the bond and security on the first day of the Court; that *Dew* has no grievance to complain of, and is not entitled to any remedy.

2. If in this I am mistaken, yet the *mandamus* was not his remedy; another person having been *bona fide* appointed, and *being in possession of the clerkship*. The proper remedy was by an information in the nature of *quo warranto*. (a) At common law, a *mandamus* never issued where there was a person holding the office, even by a *colourable* title. No case to that effect, *at common law*, can

(d) 6 *Bac. Abr.*
(*Civil. edit.*)
506. *Rex v.*
Mayor of Col-
chester, 2
Term Rep.
239.

be produced. There is a string of cases that, where a person is in by a *colourable* title only, a *mandamus* lies; but those cases are founded, not on the common law, but on the stat. 11 Geo. I. c. 4. s. 2.(a) and, even according to those cases, "where the point is at *all doubtful*, whether the "prior election be legal, the court will not grant the *mandamus* till the validity of the prior election has been determined *in a proper manner by information*." (b)

The case of *The King v. Barker*, 3 Burr. 1265 and 1379. in which a *mandamus* was granted and *quo warranto* held not to lie, was that of an application to admit a presbyterian preacher to the use of a meeting-house. The reason of that case was, that a *quo warranto* must be in the king's name, and for a regal franchise, which the right of preaching in a presbyterian meeting-house is not. In the case of *The King v. The Mayor of York*, 4 Term Rep. 699. in which a conditional *mandamus* was granted to compel the affixing of a corporation seal to a certificate of appointment, there was no other legal remedy; for a *quo warranto* would not have applied to the case, there being no person holding the office. The principle remains unimpaired through the whole course of this investigation, that, where a person is *de facto* in possession of the office, and has complied with the requisites of the law, (as *Stribling* has in this case,) a *mandamus* will not lie, but a *quo warranto*.

I am surprised that Mr. *Wickham* should say, that the remedy by *quo warranto* was created by the statute of *Anne*.

Mr. *Wickham* explained, and said that, before the statute of *Anne*, there was no remedy by *quo warranto* given to the person injured, but to the king only.

Mr. *Wirt* proceeded. 3 Tuck. Bl. 262—4, and 3 Bac. Abr. Gwil. edit. 656. shew that, long before the statute of *Anne*, the information in the nature of *quo warranto* was used, in many cases, to try precisely such questions as this; that it had long been in use to try titles to offices; and, of course

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(a) Case of the borough of Tintagel, 2 Str. 1003. Case of Aberystwith, 2 Str. 1157. Case of the Corporation of Scarborough. Ibid. 1180. Rex v. Mayor, &c. of Cambridge, 4 Burr. 2008. Rex v. Bankes, 8 Burr. 1452. 1 Bl. Rep. 445. 452. (b) 4 Bac. Abr. Gwil. edit. 514.

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the name of the king was used for the benefit of the person injured. So, here, the name of the Commonwealth might have been used, and *Dew* might have compelled the Commonwealth's attorney to file the information.

3. At all events, *Stribling* ought to have been a party, and should have had notice, even if the *mandamus* properly

(a) *Rex v. lay.*(a)
Banks,
Burr 1452

Randolph, in reply, contended, that the *express words* of the act of Assembly, made *Dew* completely Clerk from the time of his appointment and qualification; that the giving bond could not be considered as a condition precedent, since the Legislature permitted him to act without security until the ensuing Court; and if this was a defect in the law, it was not to be remedied by the Judges. The maxim that, where there is no ambiguity in the words, no latitude of construction shall be admitted, ought to govern this case. *Expediency* cannot be a ground of forfeiture. Yet, every rule of construction referred to on the other side, is founded on principles of *expediency*. In opposition to the authorities quoted on that subject, it is sufficient to observe, that an argument from inconvenience is not admissible against plain words; and to ask, how is a statute eluded by a construction according with its express language?

But, admitting the bond to be a condition precedent, must it be given on the first day of the Court? No. At the first session. This position is not controverted. But, it is said, the Court could not act without a Clerk. I answer, they could have appointed *pro tempore*; for this may be done, even when there is an existing Clerk, if he cannot attend.(b) *Dew* himself might have been appointed the clerk *pro tempore*; since he was able to execute the duties of his office as well after, as before, the commencement of the term, and the bond, when executed, would have operated retrospectively by relation. By way of objection, it is said, suppose he could not have given security on the last day of the

(a) *Rev. Code*,
1 vol. c. 66.
s. 12. p. 75.

Court, what security would there have been for the interval from the first day? I answer, what security was there from the time of appointment to the first day?

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The objection, that the *rule* was for a *mandamus* to *admit*, and not to *restore*, is a mere technical subtilty. If the Court improperly awarded the rule, it might afterwards modify it at pleasure, as was done in *Rex v. Barker*, 3 Burr. 1268.(a) It is also objected that *Stribling* was not summoned. Yet it appears, from the record, that he was present, was heard by counsel, and consented to the taking of depositions.

(a) See also
15 Vin. pl
9, citing 10
Mod. 54.

But the grand objection is that, at common law, a *mandamus* was never granted while the office was full, in which case it was usual to postpone issuing it until the title had been tried. Moreover, it is said that the *quo warranto* is the legal and specific remedy.

Admitting the *quo warranto* lay at common law, yet every authority cited proves, that its full remedial effect was given by the aid of the statutes of *Anne* and *Geo. I.* Are any decisions prior to those statutes to be found? Not one. Hence I infer, that from those statutes only has the doctrine been derived, that no *mandamus* lies where there is a person holding the office.

The case of *Rex v. Barker*, before cited, was founded on the common law, not on the statute of *Geo. I.* and is a decisive authority that, at common law, a *mandamus* may be granted to admit or restore a claimant when the office is full.

In the old General Court, before the revolution, the case of *Secretary Nelson v. The Brunswick Justices*, was tried on a *mandamus* to admit a Mr. *Edwards*, whom the secretary appointed, in opposition to a Mr. *Fisher*, who had been chosen by the County Court, and was then in possession of the office. Since the revolution also, in the cases of *Williams v. The Prince George Justices*, and of *Bland v. The Same*, writs of *mandamus* were awarded by the General Court; though, in both instances, there was a person in

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(a) See Rev.
Code, 1 vol.
c. 66. s. 12.
p. 75.

office. Yet, in none of these cases, was the objection made, which is now relied upon.

It should be recollected, that *Dew's* right to the *mandamus*, commenced at the instant the refusal to receive the bond took place; and there is no doubt that *Stribling* is not the Clerk, even if *Dew* is not. For, according to law,^(a) *Stribling* could be elected on one of two grounds only; where a vacancy happened either in vacation, or during the sitting of the District Court. Now the vacancy which occurred in the vacation, was filled by the appointment of *Dew* by a majority of the Judges of the General Court. During the sitting of the District Court, no vacancy happened; neither had the Judges of that Court a right to decide, that a vacancy existed on the ground of *incapacity* in the clerk, though they might on the ground of *death*. Two Judges could not deprive him of his office for life without a trial. No commission to *Stribling* appears in the record; and, since he could not lawfully have been elected, the office cannot properly be considered full.

As to the argument, that the question ought to be tried on a *quo warranto*, how could *Dew* have got a *quo warranto* at all? By applying to the *District Court*! And how could it be expected that they would grant it, when they had just taken such a strong step against him? The *Attorney-General* might say, that *he* was not bound to listen to his complaint; and, even if the Court should direct him, he might refuse. No man (when it might be refused) can assert, that the *quo warranto* is a legal and specific remedy.

But, suppose we were now before the Court on a *quo warranto*: it would not be in the power of ingenuity to support it, upon the present case, so as to give *Dew* relief. The judgment would be, that the franchise be seised into the hands of the Commonwealth, or that *Stribling* be ousted; and then, *Dew's* title being *prior*, he would succeed: but, his title being *imperfect*, not having been completed by giving bond and security how could he get in without a *mandamus*?

Again, an information in the nature of a *quo warranto*, is a prosecution criminal in its nature; for in such cases there is a punishment for the *misdemeanor*, as well as a judgment of *ouster*. How then could such an information lie where the defendant was guilty of no criminality? Here, *Stribling* was guilty of no offence; having, innocently on his part, been introduced by the Court into the office, after *Dew* had been set aside.

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According to the case of *Rex v. Marsden*,^(a) it is an important question whether such an information could, at *common law*, be granted upon the application of a private person.

(a) 3 Burr.
1819.

I will not detain the Court as to Mr. Johnston's question, whether an *appeal* or *supersedeas* would not lie instead of a *mandamus*. If the record discloses error, a *supersedeas* may even now be awarded.

Wickham, on the same side. If the arguments of the counsel for the appellees are correct, there is no remedy for a person illegally kept out of the office of Clerk of a County or District Court; and those Courts, acting without controul, may displace Clerks regularly appointed, and appoint others at their pleasure.

It is objected, 1st. that a *mandamus* is not a proper remedy.

But, whenever the party has no other *specific* legal remedy, he is entitled of right to this writ.^(b)

So, too, if the specific remedy be obsolete; as an *assise*.

In this case, there is no other *specific* legal remedy. A *quo warranto*, however, it is said, is a specific remedy, and, there being a person in office, the proper one; and the case of *Rex v. Mayor of Colchester*^(c) is relied on. That case, however, is partly overruled by 4 *Term Rep.* 699. *Rex v. Mayor of York*; and it does not establish the doctrine that a *mandamus* is not a proper remedy when there is a person in possession, but only that the right shall be first tried on a *quo warranto*.

(b) 3 Burr.
1267. *Rex v.*
Barker. 8
Term Rep.
651, 652. *Rex*
v. Mayor of
Stafford. 1
Term Rep.
404. *Rex v.*
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(c) 2 *Term*
Rep. 259.

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(a) 3 Burr.
1265. Rex v.
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It applies only to the case of a corporate right; and is founded on the statute of 9 Ann. See *Cay's Abr.* title *Franchise*, 27.

Certainly not to cases where, as in the present instance, the right in controversy is not a corporate one.(a)

But it is objected that the information is not given by the statute, but existed at common law. It certainly existed at common law, but only as a proceeding on the *criminal side*: it was first given to *the party*, as a *civil remedy*, by the statute. See 3 *Black.* 643. *in margine.* 3 *Black. Com.* 263. where the information under the statute is classed among civil suits. 4 *Term Rep.* 484. *Rex v. Francis*, where a new trial is given, which could not be on an information at common law: *Buller's N. P.* 211. where it is laid down that no costs are given at common law.

The *Attorney-General*, at common law, is not bound to file an information when a *criminal act* has not been committed. Now what crime has *Stribling* been guilty of in accepting an office before declared vacant by the Judges, and the exercise of which was necessary to the public good?

But the *quo warranto*, if brought at all, can only be before the same Court which has already decided the question, and from which (the prosecution being a criminal one) there could be no appeal.

This, even if the rule were different in *England* at common law, would be conclusive in favour of a *mandamus* in the present case.

No appeal or *supersedeas* would lie, (as is supposed on the other side,) because the appointment of a Clerk is neither a *judgment*, *sentence*, nor *decree*.

An action for the *mesne profits*, if it could be maintained, would not be a *specific remedy*. *Stribling* might keep the office for life, subjecting himself only to the chance of recovery of the profits from time to time by *Dew*.

The objection that the rule should have been for a *mandamus* to *restore*, concludes, against the appellee; for, if

Dew was in full possession of his office, he could not have been removed without an information, even if he had failed to give bond. The motion was made for a *mandamus* to admit, as being safest, though that to restore, was probably most proper. The Court will direct either ; moulding the rule to suit the purposes of justice.(a)

The case of *Rex v. Wildman*(b) does not prove that the rule for the *mandamus* may not differ from the rule to *shew cause* ; each of them being the act of the Court ; but only that the writ of *mandamus*, which is the act of the officer, and has no authority but the rule, must conform to it. As for the supposition that the second rule was in fact a *mandamus*, it is not necessary to argue to this Court, that an order *nisi* for a writ, is no more a writ than a judgment is an execution. The *mandamus* we ask for, is not a peremptory one in the first instance. If formal notice to *Stribling* is necessary, it is not too late to direct the *mandamus* to be served on him. That he had actual notice of the rule, is proved by his attestation to the reasons assigned by the Judges of the District Court, and his giving notices and taking depositions on the rule.

The rule ought not to have been for a *mandamus* to admit him to give bond ; the giving bond being only a circumstance attending his admission or restoration. The Court certainly have a right to direct his admission on the terms required by law. As for the objection that it is now too late to give bond, we certainly are not to lose our right by the illegal refusal of the Court to accept the bond when we were ready to give it.

On the merits, I do not understand the counsel seriously to contend, contrary to the settled practice of this Court, that real estate is not to be taken into account in estimating the sufficiency of surety. That *Dew* offered sufficient security on the first day of the term, is, I think, proved : that he might not have offered it on the first day, if the Court had not given the erroneous opinion that real estate was not to be regarded, cannot be taken for granted or proved by the opposite counsel ; and he was not obliged to fly

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(a) 3 Burr.

1268.
(b) 2 Str. 579.

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in the face of the Court, by offering such security as they had before rejected.

As to the objection that a record is not to be contradicted; we may certainly traverse the return to the *mandamus* that shall issue; which return will be matter of record; but the Court, in stating that the security offered was insufficient, only state that it was so in their opinion: whether *that* opinion was right or not, is one of the questions in controversy, and is certainly examinable in this Court. But, as sufficient security was tendered during the term, there can be no real difficulty on the merits: the words of the law requiring him to give security *at* the next Court, are satisfied by his giving security *during* the term.

There is no occasion for resorting to rules of construction: the words are plain and admit no other meaning. If the argument drawn from inconvenience, were applicable when the words are plain, both sides should be regarded. It would be a great inconvenience for the Clerk to be *compelled* to give security on the first day of the term: accident might prevent those he relied on from attending, or the Judges might differ in opinion with him as to their sufficiency. On the other hand, if he might be trusted for months without security, while acting without any controul, surely there would be less danger while he was acting for a few days under the immediate inspection and controul of the Judges.

Wednesday, November 9. The Judges gave their opinions.

Judge TUCKER. *Dew*, the appellant, obtained a rule from the General Court upon the Judges of the *Sweet Springs* District Court, to shew cause why a *mandamus* should not issue, directing them to admit him to the office of Clerk of the said District Court; to which a return was made "that at a Court held for the said District, on the 18th day of "*May*, 1805, the appellant, *Dew*, produced in Court a "commission *signed* by a majority of the Judges of the "General Court, appointing him Clerk of that District

"Court, in the room of *Samuel Dew*, senior, deceased;
 "also a certificate from the Clerk of *Botetourt* Court, of his
 "having taken the oaths prescribed by law. But not offer-
 "ing sufficient security for the faithful performance of the
 "duties of the said office, the Court proceeded to appoint
 "*Erasmus Stribling* to fill the said office, in the room of the
 "said *Samuel Dew*, who having taken the oaths as the law
 "directs, together with *James Breckenridge* and others,
 "entered into bond, &c. with such condition as the law re-
 "quires. And at a District Court continued and held as
 "aforesaid, on the 22d day of *May*, 1805, *Samuel Dew*
 "again appeared in Court, and offered sufficient security for
 "the performance of the duties of the Clerk of the said
 "Court, of which the Court took time to consider; and at
 "a Court continued and held as aforesaid, the next day, the
 "said *Samuel Dew* was refused to be admitted to the said
 "office of Clerk, because, on the first day of the term, when
 "called upon to execute a bond, he offered insufficient
 "security, although the greater part of that day was allow-
 "ed him to provide security, and previous to the appoint-
 "ment of *Erasmus Stribling*, said *Dew* acknowledged he
 "was unable to find farther security on that day; but then
 "alleged that at a future day, it was probable, he would
 "be able to obtain sufficient security."

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The commission and certificate from the Court of *Botetourt* County within referred to, are in the following words:
 "These are to certify that *Samuel Dew* is appointed the
 "Clerk of the District Court to be holden at the *Sweet*
 "*Springs* in the County of *Monroe*, in the room of *S. D.*
 "senior, deceased. Given under our hands and seals, this
 "23d of *January*, A. D. 1805." Signed with the names
 of six Judges of the General Court with seals annexed. ***
 At a Court held for *Botetourt* County, *February* 12th, 1805,
 "*S. D.* gentleman, produced in Court an appointment sign-
 "ed, &c. appointing him Clerk of the District Court,
 "holden, &c. whereupon, the said *S. D.* took the oath of

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"fidelity, the oath to support the Constitution of the United States, and the oath of the said office.

" *Teste*, H. B. Clerk, B. C.

" A Copy. *Teste*, ERASMUS STRIBLING, C. S. D. C."

To the above copy of the records of the Court, the Judges subjoined, moreover, the following reasons: "We consider it the duty of the Judges to hold a Court on the first day of the term, and find that the civil and criminal business of the country required it; that *S. Dew* was commissioned in the month of *January* preceding, and had sufficient time to have procured security, without which, he well knew he could not act. That circumstanced as the Judges were, they could not proceed to elect a Clerk *pro tempore*, and they would not have been justified in respecting the declaration of the said *S. D.* that it was probable he could get security at a future day, considering his failure for several months, and the first day of the Court, where a large number of the people of the District were present. We consider, therefore, that the Judges of that Court acted correctly and properly, in the appointment of *Erasmus Stribling*, who fully answers their expectations and those of the public." Signed by the Judges present, and attested by *Erasmus Stribling*, C. S. D. C.

As my opinion, in this case, will be founded upon the matters contained in this return, I shall no farther notice the remainder of the record and proceedings in the General Court, than to observe that the above mentioned *rule* was, on the 13th of *November*, 1807, discharged. From which order, *Samuel Dew* prayed, and was allowed an appeal to this Court.

The first question which I shall consider, is, whether the writ of *mandamus* be the proper remedy in this case?

Judge *Buller* informs us that the writ of *mandamus* is, in *England*, a prerogative writ, issuing out of the Court of K. B. (as that Court has a general superintendency over all inferior jurisdictions and persons,) and is the proper remedy to enforce obedience to acts of *Parliament*, and to the King's charters, and in such case is demandable of right. (a) Un-

(a) *Bull. N. P.* 199.

Under the term *charters*, are comprehended all grants from the Crown, whether of lands, honours, franchises, or *ought besides*. (a) Under this description then, all *commissions* granted by the Crown, whereby any person is authorised to hold, and exercise any *public office* whatsoever, come under the general head of the *King's charters*.

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(a) 2 *Blac.*
Com. 346.

To enforce obedience to such a commission, especially if founded upon the authority of an act of Parliament, the proper remedy is by writ of *mandamus*, which in such case is *demandable of right*. And it lies to compel the *admission* or *restoration* of the party applying, to *any office* or *franchise* of a *public nature*, whether spiritual or temporal. (b) Here the office claimed is founded on an act of the Legislature of the Commonwealth, and is grantable by a *commission*, under the hands and seals of a majority of the Judges of the General Court; and is, moreover, an office of a *public nature*, and which relates extensively to the administration of *justice* through a very large portion of the Commonwealth. It has, therefore, every character that may be thought necessary to entitle the person holding such a commission, and who hath been either refused admittance into his office, or improperly turned out of it, to the benefit of a writ of *mandamus*.

(b) 3 *Blac.*
Com. 110.

It has been objected, however, that a *mandamus* will not lie, where the party hath another *legal* and *specific* remedy; but, we are told otherwise by Judge *Blackstone*, who calls it a high prerogative writ, of a most *extensive remedial nature*; and that it may be issued in *some cases*, where the injured party hath also another more tedious method of redress; as in the case of *admission* or *RESTITUTION TO AN OFFICE*. (c) This is the very case now before us; and although *possibly* the injured party may have *another* remedy, I think there is no *other*, so well adapted to the nature of the case, as that by *mandamus*.

(c) 3 *Blac.*
Com. 110.

I shall now proceed to consider whether, upon this return made to the first rule to shew cause why a *mandamus* should not issue, the General Court *ought* or *ought not* to have awarded the writ.

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The return comprehends the record of the proceedings of the District Court, on three several days in the *same* term, in respect to the matter in controversy. The record of the first day states, that the appellant produced in Court a *commission*, signed by a majority of the Judges of the General Court, appointing him Clerk; also, a certificate from the Clerk of Botetourt County, of his having taken the oaths prescribed by law; but not offering sufficient security, &c. the Court proceeded to appoint Erasmus Stribling, &c.

Upon this part of the return, the Judges having certified from the record that the appellant produced in Court a *commission* SIGNED by a majority of the Judges, but not saying whether the same was under their *hands* and *seals* as the law directs, it might have been *doubtful* to the General Court, whether the *commission* was granted in such manner as the act directs; in such a case we are told by Judge Buller, that the Court will issue a conditional *mandamus*, in order that the *right* may be *tried* upon the RETURN.^(a) If, then, there were no other reason than *this* one, for refusing the writ of *mandamus*, the General Court ought to have granted it; and then upon the return, the appellant might have *traversed* that part of the return which describes the commission, and averred that it was granted under the *HANDS* and *SEALS* of the Judges. And if upon issue joined it had been so found, he would have been entitled to a peremptory *mandamus*, if there were no other cause for refusing it.

(a) Bull. N.
p. 200.

The record of the first day proceeds to state, as I have already noticed, that the appellant also produced in Court a certificate from the Clerk of Botetourt County, of his having taken the oaths prescribed by law; but, not *offering sufficient security* for the faithful performance of the duties of the said office, the Court proceeded to appoint Erasmus Stribling, &c.

The *sufficiency* or *insufficiency* of the security which the appellant offered, being a question of *FACT*, upon which the Judges of the District Court had a right to exercise their discretion, but, in which, they may nevertheless

have been mistaken, the question as to the appellant's right is thereby rendered *doubtful*: therefore, according to the authority above cited, if there were no other reason for refusing the *mandamus*, the Court ought to have granted it, that it might have been tried upon the *return*, whether the security offered was in fact, SUFFICIENT OR NOT.

The record of the fourth day states, that the appellant again appeared in Court, and OFFERED SUFFICIENT SECURITY, of which the Court took time to consider; and the next day the Court refused to ADMIT him to the said office of Clerk, because on the *first* day he offered insufficient security, and acknowledged he was unable to find *further security* on that day; but alleged that at a future day he should probably be able to obtain sufficient security.

This brings us to the question, so much agitated and discussed, whether the District Court were authorised to appoint another Clerk, in case the Clerk appointed by the Judges of the General Court, either should neglect, or be unable to give security as the law requires, on the first day of the term.

It will readily be admitted that the reasons assigned by the Judges in the latter part of their return, are very strong in favour of their opinion respecting the necessity of holding a Court, and proceeding upon the business of the District, *criminal*, as well as *civil*, on the first day of the term. And their reasons for not appointing a Clerk *pro tempore*, are perhaps strictly legal, and well founded. The question, however, still remains, whether the appellant had not a right to offer SUFFICIENT SECURITY at ANY TIME during the TERM, and that having in fact offered IT on the FOURTH day of the term, instead of the first, the Judges ought, or ought not to have received the same, and thereupon to have admitted him to exercise the duties of his office. This question depends upon the act which prescribes the manner in which Clerks of the District Courts are to be appointed; which declares "that every person appointed Clerk of any District Court, having taken the oath for giving assurance

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" of fidelity to the Commonwealth, and the oath required
 " to be taken by Clerks of Courts, adapting the same to
 " the District Court, *shall THENCEFORTH be enabled to exe-*
 " *cute THE DUTIES of HIS OFFICE.*" The appellant produ-
 ced to the Judges of the District Court, on the *first* day of
 the term, a certificate that he had strictly complied with
 this injunction of the law: he had been duly authorised
 thereby to *execute the duties of his office*, from the 12th of
February to that period. If an officer be created by letters
 patent, (and *commissions* are letters patent,) he is a com-
 plete officer before he is sworn, and before any *investi-*

(a) 5 Bac.
 Abr. Civil. ed.
 188. tit. "Offi-
 ces and Offi-
 cers," letter
 E.

ture.(a)

But the appellant had been *sworn*, and had been for
 more than a quarter of a year *duly* authorised by the ex-
 press words of the law, to execute the duties of his office;
 he was (if *duly appointed*, of which hereafter) Clerk *de jure*
 and *de facto*; like a spiritual Clerk in holy orders, who
 having been duly presented, instituted, and inducted, into
 a rectory, is in full and complete possession, and in legal
 phrase is called parson-imparsonnee. The duties of his
 office, means ALL the duties of it, as well *in Court* as *out*
of Court; nor can the risk of misconduct for a *few* days
 under the immediate eye of the Court, bear any comparison
 with that which may be supposed to arise, from a Clerk's
 performing the duties of his office, without being subjected
 to such an immediate superintendence and inspection, for a
quarter, or *half* a year, as the law allows.

The appellant having produced to the Court such a
 certificate as the law directs, the Court were *bound* to *enter*
the same of record. This was all that was necessary to be
 done at that time: it would thence appear of record, that
 he was duly commissioned, and had *done* and performed
 all that the law required, to enable him to *execute* the
duties of his office; no ceremony of admission or induction
 was necessary, no additional oath was required to be taken.

But it is objected, he did not, nor could not give suffi-
 cient security for the faithful performance of the duties of his

office, on the *first* day of the term. Let us consult the law, and be guided by the spirit as well as the letter of it.

Every person appointed Clerk of a District Court, may take the oaths required to be taken, previous to his entering upon the execution of the duties of his office, before *any Court of Record* in the Commonwealth, after which, or in the emphatical words of the law, from *henceforth* he shall be enabled to execute the duties of his office ; a certificate of which qualification shall be entered of record in the District ; “ wherein, at the *first session*, he shall, moreover, enter into bond with sufficient security,” &c.

It is contended that the words at the *first session*, must mean the *first day* ; but I see no reason for that *construction* any more than the *first hour*, or the *first minute*. The term *session*, when applied to Courts, means the *whole term* ; and in legal construction, the *whole term* is construed but as *one day*, and that *day* is always referred to the *first day* or commencement of the term ; and this construction has been carried so far, that where parties had covenanted to levy a fine at the *next term*, and one of the parties died after the *first day* of the term ; and the fine was entered at a subsequent day of the same term, this fine was held to be well levied, notwithstanding one of the parties was dead at the time ; he being living on the *first day* of the term, and the whole term considered as *one day*. It is the same with a judgment in any other case. (a) In the present case, such a construction appears to me to be very reasonable. The securities of a Clerk might reside at a distance from the Court, and might not attend the *first day* ; the Clerk himself might not, from sickness, or other sufficient cause, be able to attend ; the Court might be dissatisfied with the sufficiency of the security offered, but upon further information be satisfied with it ; or the Clerk, as in the present case, might, at a future day, be able to offer additional security, to the full satisfaction of the Court.

Ought a man to be ousted from his office under such circumstances, although the law had permitted him to exercise it for half a year before, without any other security

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(a) 7 Term
Rep. 20.
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than his integrity, his oath and his conscience? I have before stated that the comparative risk of misconduct in the presence, and under the immediate inspection and controul of the Court, was very slight in such a situation. And should he neglect to produce sufficient security before the end of the term, such neglect would undoubtedly be a cause of *forfeiture*, and he might be immediately proceeded against, and evicted, as the Constitution and the law direct. The requisition of the *law* that a Clerk is to give bond with sufficient security, for the faithful execution of the duties of his office, is a *condition in law*, and is to be construed as a limitation; his office would legally terminate with the session,^(a) but not *before*.

(a) 2 Black.
Com. 155.

(b) 1 Black.
Com. 493.

(c) L. V. ed.
1794, or Rev.
Code, vol. 1.
c. 15. p. 18.
Ibid. c. 66. s.
14. p. 75.

This may be compared to the case of a parson, who may neglect AFTER institution and induction to read the liturgy and articles of the church, or make the declarations against *popery*, or take the *abjuration oath*; or may absent himself sixty days in one year, from his benefice, in certain cases. In all which cases, we are told, the benefice is *void*.^(b) Still both the *law* and the Constitution, require that he should not be ousted of the office in which he had a freehold, but by due process of law.^(c) The Judges of the District Court, probably, did not consider him as duly *invested* with his office, until he had given bond and security. Upon that point, I feel myself constrained to differ with them. On this point, then, I am clearly of opinion, that the appellant ought to have been admitted to give bond and security at any time during the session.

We now come to one of the principal stumbling blocks opposed to the emanation of the writ of *mandamus*, by the counsel of the appellees. They tell us, that if a *mandamus* be awarded, Mr. *Stribling* will be turned out of office, without that due process of law, which the Constitution and the acts which I have before referred to, prescribe; and a distinction was taken between a *mandamus* to *admit* and one to *restore* a person to an office. The former, it is said, gives only a *legal*, not an actual possession; though in a *manda-*

mus to RESTORE, the Court will GO FURTHER ; and for this 1 *Strange*, 538. and 3 *Burr*. 1267: were cited and relied on.

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In the latter case, however, the Court granted a *mandamus*, although there was another person actually in office ; and although the right claimed, was barely a *legal right*, but perhaps not, in strictness, a *public office*. But the question now before us, concerns an important public office, which concerns, or at least is necessary, to the administration of justice. Shall we, then, in such a case, be deterred from pursuing that course which will most effectually advance justice, and preserve rights ? But we are told, Mr. *Scribbling* ought to have been served with *notice* of this motion, that he might contest the rule. It was properly answered, that the return shews he had notice, being *attested* by HIM ; and the record shews he did appear in the General Court as a PARTY, and consent to the award of a commission to take depositions : what need then of further notice ?

But another objection has been insisted upon, that although the General Court might have been of opinion, that they ought to have granted a writ of *mandamus*, they could not have granted the PROPER writ in this case, being tied down by the terms of the rule. But can it be seriously supposed that this objection can prevail in a case which concerns the general administration of justice, over a very large portion of the Commonwealth, wherein all due expedition ought to be observed, and where (in my opinion, at least) no other specific or adequate remedy can be found ? Can it be seriously contended, I say, that, if, upon the return of the rule to shew cause, it should appear, that there were circumstances in the case which might render it necessary and proper, in order to fulfil the intentions of the law, and to do strict justice between the parties, in some measure to vary the terms of the writ, from those of the rule, the Judges of the General Court were bound rather to discharge the rule, than to accommodate the terms of the writ to the nature of the case, in order to do strict right and justice, and to put an end to a contest, injurious

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not only to the parties, but to the public in general? I revere the maxim *EST BONI JUDICIS AMPLIARE JUSTITIAM*; and where the general weal requires it to be done, as far as in me lies, I shall endeavour to conform to it. I think, then, the General Court might have awarded the *writ*, in terms commanding the Judges of the District Court to receive bond from the appellant, with the security offered by him on the *fourth day*, or such other sufficient security as he might offer, *during* the next succeeding term, and THEREUPON to *restore* him to his office of Clerk, or to shew cause to the contrary. Nor can I perceive the smallest inconvenience which such a departure from the *words* of the *rule*, could have produced, either to the public, or to the parties.

Hitherto I have considered this case, as if it had appeared by the return that the appellant had been *duly* appointed, by a majority of the Judges of the *General Court*; by COMMISSION under their *hands* and *seals*, granted by them to supply a *vacancy*, in the office of Clerk of the District, which had happened *since* the last session of that Court, by the death of *Samuel Dew*, sen. the late Clerk, in VACATION; ALL WHICH CIRCUMSTANCES, I hold, ought to appear upon the *FACE* of the *commission*, or the same will be *void*.

Wherever the right of granting and creating new offices is vested in the king, as the head and fountain of justice, *he must use proper words for that purpose*; as in the erection of a *new* office, the words *erigimus*, *constitutimus*, &c. must be made use of; and it hath been *adjudged*, that the word *CONCESSIMUS* is not sufficient, unless there be an office, already in being.(a)

(a) 5 Bac.
Abr. Guil.
edit. 188.
tit. Offices,
&c. letter E.

An office being a thing which lies in grant, cannot regularly be granted but by deed, duly executed. 1 *Leon.* 219. *Gawton* and Lord *Dacres*. Where the form of the words of nomination to the office of Clerk of the Peace by the *Custos Rotulorum* of the County, were, "*I do nominate* the said *Philip Owen* to be Clerk of the Peace, according to "the act of Parliament," which was held good, the Court

of King's Bench *reversed* that judgment, because he did not name any County certainly, of which he should be Clerk, (although the nomination was in open Court,) nor distinguish which statute he intends; for there are two statutes which concern this matter.(a)

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A *commission* is a *delegation* by warrant of an act of Parliament, or of the common law, whereby jurisdiction, power, or authority is conferred to others. They are like the king's writs; such are to be allowed which have warrant of law, and continual allowance in Courts of Justice.(b)

(a) 2 Salk.
467. Saunders
v. Owen, cited
in Buc. Abr.
Offices, (E.)

(b) 4 Inst.
163. 3 Inst.
656.

In the reign of Edward III. the Justices were so careful, that no innovation should creep in concerning *commissions of oyer and terminer*, that certain Justices, having their authority by *writ*, where they ought to have had it by commission, though it were of the form and words that the legal commission ought to be, *John Knivit*, Ch. J. by the advice of ALL THE JUDGES, resolved tha. the said writ was *contra legem*. And whereas divers indictments were before them found, all that were done by colour of that writ were damned.(c)

(c) 4 Inst.
164. Bro.
Abr. Commis-
sions, 16.

In *England*, as I have before shewn, the king's commissions are by letters patent, under the great seal, and are matter of record, and as such are evidence (or rather the *highest* evidence) in themselves. It is the *very act* which *delegates* an AUTHORITY, and therefore ought, *upon the FACE OF IT*, to shew EVERY THING that is necessary to its *validity* and PERFECTION; and ought to contain APT WORDS for that purpose; otherwise it may be void for uncertainty; it should, moreover, conform to the directions of the law, and constitution of the State.

The Constitution, *art. 18.* directs, that commissions and grants shall run IN THE NAME OF THE COMMONWEALTH; this paper does not. Whether it were competent to the Legislature to authorise any commission whatsoever, to be granted in any other manner or form than the Constitution prescribes, is not necessary now to be determined; having given no directions concerning the *tenor* of the commission,

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it ought, I conceive, to conform to the directions of the Constitution.

The Judges of the General Court having no power, (except by law, to appoint Clerks of the District Court,) THEIR AUTHORITY ought to appear, upon the face of the commission. It ought, moreover, to appear upon the face thereof, that they were not only JUDGES OF THE GENERAL COURT, but a majority of them.

It ought to have appeared that *Samuel Dew*, sen. died between *term* and *term*, and that the commission was granted to supply the *vacancy* so happening in *vacation*, because the law prescribes *another* mode of appointment, if the vacancy happens in *term time*.

It ought to have contained words of *grant* or DELEGATION of authority, as "we do appoint," in the first person; thereby manifesting this to be their ACT of *delegation*; whereas the paper only certifies, that the *appellant* is appointed, not specifying *when*, or by *whom*, or by *what authority*. Any man, who knew the fact, might grant such a certificate, and it would, in my opinion, be just as good evidence in a Court of *Record* as this paper.

The nature and tenure of the office ought, moreover, to have appeared upon the face of the commission; the same *being grantable during good behaviour*; whereas upon this paper it might be made a question whether it were such an office, or one during pleasure or otherwise.

The law having in one section, and upon one occasion, authorised an appointment to be made by *certificate*; (a) and in the very next section having directed, that the appointment, in all other cases, and on all future occasions, shall be made by *commission*, we must believe the Legislature both *understood* and *intended* a DIFFERENCE between them; and so the Judges understood it upon some other occasions. (1)

(a) See *Acts of 1788*, c. 67. s. 19, 20. in which this distinction is most obvious and incontestible.

(1) *Extract from the act of 1788, intitled "An act establishing District Courts, and for regulating the General Court."*

Sect. 19. (p. 31. of Sessions acts.) "The Judges of the General Court shall forthwith assemble at the Capitol in the City of Richmond, on a day

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I think it highly probable, that the appellant's ardour and haste in pursuit of his appointment, induced him to prepare this instrument for the signature of the Judges, before he applied to them respectively for an appointment, and that without examining the law, as they would otherwise undoubtedly have done, they subscribed their names to the instrument so presented. The very high respect and esteem I entertain for the whole of that most worthy and respec-

"to be appointed and notified to each Judge, by the Governor, with advice of the Council, and they, or such as shall meet, provided the number be five, shall proceed by a majority of votes, to appoint a Clerk for each District Court, making a list of the several appointments, to be returned to, and entered of record in the General Court at their next succeeding session. They shall also give to each Clerk elected, a certificate of his appointment, who having taken the oath for giving assurance of fidelity to the Commonwealth, and the oath required to be taken by Clerks of Courts, adapting the same to the District Court, shall thenceforth be enabled to execute the duties of his office; which oaths may be taken by the Clerks respectively, either before the Judges so assembled, or any Court of Record in the Commonwealth; and a certificate thereof, as well as of the appointment of each, shall be entered of record in his District; wherein, at the first session, he shall, moreover, enter into bond, with sufficient security, in the penalty of three thousand pounds, payable to the Governor or Chief Magistrate, and his successors, with condition for the faithful performance of his duty; which bond may be put in suit for the benefit, and at the costs of any person or persons, aggrieved by the nonfeasance or misfeasance of the Clerk, as often as there shall be occasion, until the whole penalty shall be recovered or levied. Each Clerk shall hold his office during good behaviour; shall be removable on conviction upon an indictment or information, for misuser or nonuser in office, and shall reside and keep his office at the District Court-House of which he is Clerk; but when it is held alternately at different Court-Houses, then he shall keep his office at the one or the other Court-House as he may think best."

Sect. 20. "Whenever there shall be a vacancy in the office of Clerk of any District Court, or if a number sufficient to appoint Clerks shall not meet at the Capitol, in the City of *Richmond*, on the day aforesaid, it shall be lawful for a majority of the Judges of the General Court to appoint by commission under their hands and seals. Provided, that when such vacancy shall happen during the session of a District Court, or the Judges of the General Court shall neglect to supply any vacancy until the ensuing session of the District Court in which the vacancy shall be, it shall be lawful for the Judges attending such District Court, to appoint a Clerk by commission under their hands and seals, which shall be as valid and effectual as if granted by a majority of the Judges of the General Court. And

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table Bench, induce me to make this conjecture, as to the error into which, I apprehend, they have inadvertently fallen.

Conceiving, therefore, that the paper which is spread upon the record, as the commission which the appellant presented to the District Court, is not a *commission*, as the law requires, I am of opinion that the judgment of the General Court refusing the writ of *mandamus*, ought to be affirmed; the appellant not having shewn any legal right to the office he claims,

"where the Clerk of any District Court cannot attend, it may be lawful for the Judges of such Court to appoint a Clerk *pro tempore*."

*Certificate of appointment granted to JOHN BROWN, under the 19th section of the acts of 1788. c. 67.*

"We the underwritten Judges of the General Court, do hereby certify, that *John Brown*, of the City of *Richmond*, at a meeting held by us this day at the Capitol, in the City of *Richmond*, being the day appointed for the purpose, and notified to us by the Governor with the advice of council, was by a majority of votes appointed Clerk to the Court for the District composed of the Counties of *Henrico*, *Hanover*, *Chesterfield*, *Goochland* and *Powhatan*, and that the said *John Brown* before us assembled as aforesaid, did take the oath for giving assurance of fidelity to the Commonwealth, and the oath of Clerk of the said District Court, according to law.

"Given under our hands and seals this 9th day of *February*, in the year of our Lord 1789.

|                         |                              |
|-------------------------|------------------------------|
| "James Mercer, (L. S.)  | <i>Richd. Cary</i> , (L. S.) |
| "Richd. Parker, (L. S.) | <i>James Henry</i> , (L. S.) |
| "Edm. Winston, (L. S.)  | <i>John Tyler</i> , (L. S.)" |
| "Cuth. Bullell, (L. S.) |                              |

*Commission granted to John Robinson, under the 20th section of the act of 1788, c. 67.*

"We the underwritten Judges of the General Court, being a majority thereof, pursuant to the power given us by law, do hereby appoint *John Robinson*, Clerk of the Court for the District composed of the Counties of *Henrico*, *Hanover*, *Chesterfield*, *Goochland* and *Powhatan*, in the room of *Anthony Robinson*, who hath resigned. To hold the said office of Clerk of the said Court, during good behaviour.

"Given under our hands and seals this sixteenth day of *June*, one thousand seven hundred and ninety-six.

|                           |                                 |
|---------------------------|---------------------------------|
| "Joseph Prentiss, (L. S.) | <i>Joseph Jones</i> , (L. S.)   |
| "S. G. Tucker, (L. S.)    | <i>Wm. Nelson, jun.</i> (L. S.) |
| "John Tyler, (L. S.)      | <i>Robt. White</i> , (L. S.)"   |

Judge ROANE. I will first inquire whether a *mandamus* is a proper remedy in this case ; and secondly, whether, on the merits, the appellant is entitled to succeed in his application.

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It is agreed on all hands that this writ (which, in *England*, is considered as a *prerogative* writ) lies to admit or restore to an office which concerns the administration of justice ; and that, in various other cases, it ought to go, on reasons of public policy and convenience. In no case can those reasons apply with more force than in the present, where it is not only important that the rightful officer should enjoy his franchise, but, also, (in a public point of view,) have possession of the records, and administer the duties of his office. It is important, too, that the most *speedy* decision should be given on the subject, as is manifest from the course adopted by this Court in taking up the cause out of turn ; and, as conducive to that end, the most direct remedy should be pursued, which is consistent with justice and the policy of the laws. It is agreed that a *mandamus* will lie where a party has a legal right, and no other *specific* remedy, or a specific remedy (as an *assise*) which has become *obsolete*. This remedy by *assise*, is considered in 5 *Bacon*, 197. as *perhaps* the only specific remedy in this case ; and it will not lie unless the party has had a *seisin* of his office : (*ibid.*) it was *always*, therefore, an incompetent remedy, in cases where a party requires to be *admitted* to an office, to which his title has not been perfected by a *seisin*. An information in nature of *quo warranto*, whether considered as under the statute of *Anne* in *England*, or as at the common law, is not in itself a *specific* remedy : it only paves the way for the introduction of a specific remedy, by producing a judgment of *ouster* against a person actually in possession of the office : and the principal differences between these two modes of proceeding are, that the common law information does not go without the intervention of the prerogative, (in *England*,) whereas, under the statute of *Anne*, an information may be brought, in relation to *Corporation disputes*, without the leave of the Court, at the

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(a) 3 Black.  
Com. 262.

(b) *Ibid.*

instance of any relator ;(a) and also that the statute of *Anne* has provided for a *speedy* hearing, &c.(b) On general principles, therefore, it would seem to be more proper, (or rather less objectionable,) to turn over the party to his *private* and more speedy remedy under the statute, than to the common law information, which he cannot use without the intervention of the prerogative, or the permission of the Attorney-General, and the proceedings on which are, *perhaps*, more dilatory than in the other case.

It seems admitted by the course of the argument in this case, or, if not, it is extremely clear, that a *mandamus* will lie to *restore*, as well as to *admit*, to an office like the present ; but it is contended that, where the office is full, the *mandamus* ought to be preceded by an information to try the right, and produce a judgment of *ouster*. Let us examine this position. It seems at least questionable, whether all the *English* cases in which this position has been taken, have not been bottomed upon the statute of *Anne*, and therefore, not only had relation only to *Corporation disputes*, which alone are embraced by that statute, but would not apply in this country, where we have no similar statute. If the course adopted by those decisions be reasonable, considered in that relation, it does not follow that it is equally so in relation to the common law informations, and to offices in general. But, even in *England*, under the statute, and in relation to *Corporation disputes*, it is not an *universal* proposition that the *mandamus* must be preceded by an information, where a person, as officer, is in actual possession : it is said that in cases where his right is *doubtful*, and " fit " to be tried on an information in nature of *quo warranto*," the *mandamus* ought not to go in the first instance ; but otherwise where the election is merely colourable, and the office is clearly void. The cases of *The King v. Banks*, *The King v. Barker*, &c. are cases in which the *mandamus* went in the first instance, although the office was full. But it is said that the authority of these cases is done away by the decision in *The King v. The Mayor of Colchester*,(c) in which it was said to be a decisive answer to an applica-

(c) 2 Term  
Rep. 260.

tion for a *mandamus*, that there was another remedy by information in nature of *quo warranto*, by which the title of the person in possession of the office could be tried, *as well as on a mandamus*; and that the consequence of the rule contended for in that case would be, that a second person would be admitted to an office already filled by another.

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The decision in that case does not overrule those just mentioned, when we have reference to the correct rule of construction, that general expressions in a decision shall be expounded by relation to the actual circumstances which exist in the cause. In the case of *The King v. Colchester*, as the *legality of the votes* given at the election was disputed, it was a case of *doubt*, and "fit to be tried on an information," and therefore, expressly comes within the distinction taken in *The King v. Bankes*, &c. Wherefore, then, shall we overrule that whole series of cases, without necessity and by a side wind? Wherefore shall we say that *in all cases*, (in cases in which there is no doubt,) an information is an indispensable prerequisite? As to the consequences, just spoken of, in the case of *The King v. Colchester*, the *existing* officer must always be a party to the rule: (a) *his* claim would, therefore, be tried, and consequently complete justice be done; and the peremptory *mandamus* would, in effect, operate as a judgment of *ouster*.

(a) *Rex v. Bankes and Rex v. Barker, ante.*

I take it, therefore, that even in *England*, and in relation to cases within the statute of *Anne*, the possession of the office by another is no impediment to a *mandamus*, where the title of the applicant is clear; where the title of the incumbent is clearly void; and where no utility can result from a trial on a *quo warranto* information; and, *a fortiori*, in this country, where the proceeding by information is not guaranteed to every citizen, but must be pursued, if at all, by permission of the Attorney-General under the common law.

In this case, (as I shall presently attempt to shew,) the title of *Dew* to his office was complete, and the election of *Stribling* was clearly void *under the law*, and the case involves no facts which were necessary to be tried on an in-



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(a) Rev.  
Code, 1 vol. p.  
302.

formation : besides, the right of *Stribling* (as he must be a party to the *mandamus*) could as well be tried on a *mandamus* as on an *information*, especially under our act of 1799,(a) regulating the proceedings in cases of *mandamus*. The effect of a peremptory *mandamus* to restore, will be equivalent to that of an actual and previous judgment of *ouster* ; and, if there be any irregularity in this mode of proceeding, it is abundantly overpaid by the consideration that the end is much more *speedily* attained by this remedy, than by the intervention, in the first instance, of an *information* in nature of *quo warranto*.

As to the objection to the form of the rule in this case, it being to *admit*, whereas I am of opinion it ought to have been to *restore*, there is nothing in it. Many cases were cited to shew (and, if there were none, I should readily sanction the power in the Court, considered as *res nova*) that rules may be changed and modified so as to square with the rights of parties, and to attain the real justice of the case. As to the proceeding being *ex parte* in relation to *Stribling*, it appears, on the record, that he is in reality a party to the rule, has examined witnesses, and, I suppose, employed counsel : but, if this were not the case, he must be made a party to the *mandamus*, when it issues, or, rather, he must (by its service on him) be apprised of it, and thus enabled to defend his rights ; which rights would otherwise, perhaps, not be barred. It is as desirable to a Court of Law, as to a Court of Equity, to avoid circuitry, and to come at the substantial justice of the case as soon as may be ; and, to that end, the Courts of Law will modify and adapt the course of their proceedings so as to attain the desired purpose.

On the merits of this case, I am clearly of opinion, (whether considered only on the returns to the rule, or on the whole evidence,) that *Dew* was a *complete* Clerk ; (admitting the authenticity of his commission and certificate of qualification ; ) that *Stribling* was appointed wholly without authority ; and that all this appearing by a mere reference to a general law on this subject, and the controversy

in this case involving no other *facts*, than the existence of the commission and the qualification by taking the oath, the General Court was entirely competent to decide on the motion for a *mandamus* in the first instance, and need not, as a preliminary, have referred the case to any other Court or tribunal.

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*Dew* was a complete Clerk. He was appointed by a majority of the Judges of the General Court, in vacation, and had taken the oaths of office as required by law; and thenceforth he was "enabled to execute the duties," (*i. e.* all the duties) "of HIS office." (a) The criticisms of the appellant's counsel, on this point, are entirely satisfactory; and I adopt their construction of the act, without repeating the grounds of it. As to inconvenience, there is no great injury or inconvenience resulting to the public or to individual citizens, from indulging the Clerk, *yet a few days longer*, to give security, and the words of the act are fully competent to give him the whole term after his appointment for that purpose. The latitude of the expressions of the act, especially as there may be also inconveniences and hardships under a contrary construction, must preponderate in the case.

Rev. Code, 1  
vol. p. 75.

As to the objections to the *commission*, in the present case, (taken for the first time from the Bench,) I think there is nothing in them. It is said that the commission is void, as not being pursuant to the Constitution; and that it is also a fatal objection, that the commission itself does not specify the character of the grantors, and state in precise terms the tenor and extent of the authority granted. As to the first ground of objection, which is, more particularly, that the commission does not run *in the name of the Commonwealth*, the answer is, that this is only requisite in commissions emanating from the executive authority, AND WHICH are to be tested by the Governor under the seal of the Commonwealth. This provision in the Constitution, does not necessarily extend to particular trusts or authorities, which, it may be provided by law, shall flow from

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 other sources. In fact, I now have in my hand, two commissions of different Clerks of District Courts, in which *this* is omitted, though the commissions seem to be in other respects full and perfect; and it is presumed that no commission now existing under the District Court law, would stand the test of this objection.

As to the other objection, it is said that the commission in question does not state that the grantors were Judges of the General Court. The answer is, that this is not particularly required by the act; that it is a notorious fact, apparent on almost every page of the District Court records, *who* are the Judges of the General Court, as the allotments of Judges to the several District Courts, as made by the Judges of the General Court, are, I believe, recorded in the former; and that this Court does take cognisance of and admit that fact in a variety of instances.

We know as well, *in this case*, that the grantors are Judges of the General Court, as, (for example,) *in the ordinary case* of grants of *supersedeas* by those Judges, the award of which never states their quality or character of Judges of the General Court; and yet, notwithstanding the power of granting writs of *supersedeas* to the judgments of the County Courts is given to the Judges of the General Court ONLY, an objection on account of this omission has never been taken, or, if taken, would be indubitably scouted by this Court. It is also objected that this commission should appear to have been granted by a majority of the Judges of the General Court: The answer is, that it is granted by six Judges; and we know by the general law of the land, that there are only ten Judges in that Court. Again, it is said that this commission is insufficient, as it only uses the words "*is appointed,*" and omits the usual technical words "*do hereby constitute and appoint,*" &c. The answer is, that this is essentially equivalent; and in 3 *Bac. Abr.* 387. (*Gwil.* edit.) the words *dedi et concessi* are said to amount to a grant. Again, it is objected that the commission does not guaranty the office *during good behaviour*: The answer is, that the Clerk, when appointed, has this tenure by a paramount authority; by the terms of the

act itself, which have expressly sanctioned this tenure. But what has considerable weight with me, in relation to the *sufficiency* of this commission, arises out of the original act of 1788, on this subject. By that act, a *certificate of appointment* by the majority of the Judges, accompanied by a qualification by taking the oath of office, completely constituted the *original* Clerks ; and the act further providing for the case of a non-attendance by the Judges on the day appointed for this purpose, or for vacancies thereafter happening, directs that, in those cases, a majority of the Judges shall appoint by *commission* under their hands and seals. Now, it would seem reasonable, (as there is no good reason why there should be more particularity in the one case than in the other,) that the "*commission*" here intended should receive its *character*, except in relation to the *seal*, (which is expressly required by the act,) from the "*certificate*" prescribed in relation to the original Clerks, and that as much *generality* should be tolerated in the one case as in the other. But I go upon this still broader ground, that I am unwilling to defeat or overthrow the rights of our citizens, when *substantially* conferred and granted, upon mere technical objections ; upon objections so extremely nice and subtle, that they have never occurred to, or been taken by, any of the opposing counsel, in either of the Courts in which this case has been so copiously and ably discussed. In this case, the office of Clerk is granted by those who are known to us, *ex officio*, to have competent authority ; and the *general law* upon the subject comes in aid of any expressions, otherwise *too general*, and defines the tenure and extent of the authority in question.

From the foregoing considerations, it appears that no vacancy of Mr. *Dew's* office had happened at all, and consequently none accrued during the session of the District Court, without which the Judges of the District Court had no power to appoint another. Mr. *Stribling*, therefore, clearly appears to us (admitting the existence and legality of the commission and certificate before mentioned) to have no manner of title to the office.

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With respect to the merits of this case, as disclosed by the *testimony*, I am of opinion, that the District Court erred in their construction of the law, on the day in which *Stribling* was appointed. The Court would neither suffer *Dew* to act as Clerk without giving security; allow him a reasonable time to obtain *personal* security, to the amount required; (and any man might be placed in his situation by the failure of his friends to attend on the first day of the Court;) nor admit sureties whose *landed* estate was amply sufficient.

I am of opinion, that landed property ought to have been taken into the account. I ground this opinion on the established doctrine as to justifying bail. In 3 *Bl. Com.* 291. it is held, that those justifying as bail must swear, that they "ARE WORTH" the full sum, after their debts are paid. By analogy to this case, and seeing no ground for excluding the *real* estate, I think the District Court erred, in confining their inquiries to the personal estate only. I am also of opinion, that *Dew* ought to have been permitted to act as Clerk without giving security; his failing to do which, however, during the whole of the term, would probably have subjected him to the loss of his office.

In every view, therefore, which I have been able to take of this case, I am of opinion, that the judgment of the General Court is erroneous; and that a *mandamus* ought to go to *restore Dew* to his office, of which he was completely invested by the commission and certificate of qualification; to be served, also, on *Stribling*, who will thereby have an opportunity to defend his possession and his title, and *possibly* to *vary* the case as it now appears to us. It is only upon the present aspect of the case, as disclosed by the testimony, that the opinion now pronounced has been founded.

Judge FLEMING. Three questions seem to be presented in this case, and I shall consider, FIRST, whether the commission of *Samuel Dew*, presented by him to the District Court held at the *Sweet Springs*, on the 18th day of *May*, 1805, was of sufficient validity to authorise him to exercise the office of Clerk of the said Court.

2d. Whether he ought to have been allowed a further time, during that session of the court, to give such bond as the law required, before another Clerk should have been appointed ; and if so,

3d. Whether his proper remedy of redress be by *mandamus*.

The counsel for the appellees stated, and argued the two latter points only ; because, perhaps, had they urged the former against the appellant, they would have trodden on tender ground.

The substance of the acts of Assembly, so far as they apply to the case before us, have been so fully stated, that it seems unnecessary here to recite them, and I shall proceed briefly to state, what I conceive to be the true, rational meaning of the word *commission* ; without recurring to the subtleties, and nice distinctions, of ancient *English* writers, in times of high *regal prerogative*, and my definition of it will be very short.

I take a commission to mean a warrant of office, a written authority or license, granted by a person or persons, duly constituted by law for the purpose, to a public officer, empowering and authorising him to execute the duties of the office to which he may be appointed ; and where there is no particular *form* of such commission prescribed by law, those who are constituted for the purpose, may use such *form* and *language* as to them may seem proper ; so that the purport of such commission be clearly understood.

It is said that the commission of Mr. *John Robinson*, Clerk of the District Court of *Richmond*, (a copy of which is before me,) is a proper one. That is readily admitted ; but it does not thence follow, that the one now under discussion is not of equal validity, because it is less *formal* and more concise. Four of the six Judges who granted the former, have put their HANDS and SEALS to the latter, with the addition of two other Judges ; and although they do not therein style themselves Judges of the General Court, the records of that Court, in many instances, prove them

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to have been so ; and I can neither suppose them ignorant of what they were doing, nor that they meant to ensnare a man whom they were appointing to an office of great importance to a large portion of the community, and of high responsibility respecting the officer himself, and who (acting under it) would have been as amenable for misconduct in office, as if his commission had filled a whole sheet of paper.

Let the paper before us be called a *certificate*, a *testimony in writing*, or what it may, it has, in my judgment, the true essence of a commission ; and having been granted by a majority of the Judges of the General Court, appointed by law for that purpose, *Samuel Dew*, by virtue thereof, so soon as he had taken the oaths prescribed by law, and obtained a certificate of the same from a Court of Record, had, in my conception, full power and lawful authority to exercise the office of Clerk of the District Court, at the *Sweet Springs*, which he did exercise (being thus duly qualified so to do) from the 12th day of *February*, till the 18th day of *May*, 1805, when, it appears to me, he was superseded, and *Erasmus Stribling* appointed Clerk in his room, contrary to law. The Court that made the latter appointment, found no fault with *Dew's commission*, (for so it is properly called in the record of that Court,) which states it to have been signed by a majority of the Judges of the General Court ; and the same record states, that the commission certified by the County Court of *Botetourt*, where *Dew* took the oath required by law, was under the *hands and seals* of the Judges, and so it appears, a copy of the commission being spread upon the record ; but the Court rejected and superseded him, merely because he was unable to give satisfactory security, on the first day of the session, and appointed *Stribling* Clerk (as appears by the testimony of some of the witnesses) about three o'clock on the same day. This, to me, appears to have been precipitate indeed.

Should this Court decide, that *Dew* had no legal authority to act as Clerk between the 12th day of *February* and

the 18th day of *May*, 1805, all his official acts must be null and void, and be subject to an action for every *capias* and execution issued by him during all that time.

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Let us next examine by what authority *Stribling* was appointed Clerk. Two cases *only* occur to me in which a District Court is authorised to appoint a Clerk : (except a Clerk *pro tem.* where the existing Clerk cannot attend :) one case is, where a vacancy shall happen during the session of a Court, and the other is where the Judges of the General Court shall neglect to supply any vacancy until the ensuing session of the District Court, in which the vacancy shall be. Neither of which was the case when *Stribling* was appointed Clerk.

I proceed to consider, *secondly*, whether *Dew* ought not to have been allowed the whole term or session, to give bond and security for the faithful performance of his duty, admitting, for argument sake, that the security offered on the first day of the session, was insufficient; and here I must have reference to the 13th section of the District Court law, wherein it is declared, that every person *appointed* Clerk of any District Court, having taken the oath for giving assurance of fidelity to the Commonwealth, and the oath of office, shall thenceforth be enabled to execute the duties of his office, which oaths may be taken before any Court of Record in the Commonwealth, and a certificate thereof shall be entered of record in his district, wherein at *the first session* after his appointment, he shall moreover enter into bond with sufficient security, payable to the governor, and his successors, &c. &c. with the condition for the faithful performance of his duty.

The counsel for the appellees argued the point upon different grounds. Mr. *Johnson* and Mr. *Wirt*, pointing out the great inconvenience, loss, and probable ruin, that might have been sustained by individuals, should *Dew* have been permitted to exercise the office a few days in *term* time, without giving the security required by law; but did not advert to the circumstance, that he had already, agreeable



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to law, exercised the office for more than three months, when he was under no controul whatever, and for the few days he requested indulgence till he could find security, he would have been acting under the immediate eye and inspection of the Court, when no inconvenience or injury could have been justly apprehended. Mr. Hay,<sup>(1)</sup> however, rested the point, principally, upon the words, and strict letter, of the law, contending that the word *at*, means *commencement*, and therefore that Dew was bound to tender security, and enter into bond, the moment the Court was opened on the 18th of May, otherwise he forfeited the Clerkship.

According to what I deem to be the true construction of the clause, which requires a Clerk *at* the first session of the Court, after his appointment, to enter into bond with sufficient security, he ought to be allowed the whole term, or session of the Court, to provide and give the security so required; which, if he tenders it at the last hour of the session, the Court is bound to receive, take his bond, and enter it upon the record: which, in my apprehension, would be a due compliance with the object, intention, *and even with the letter of the law*. But had the appellant, Dew, failed to give, or tender the security required, during the session, the office would then have become forfeited and vacant, and might have been supplied as in cases of ordinary vacancies.

3. On the third question, whether the appellant's proper remedy be by *mandamus*, I shall say but little, the subject having been already amply elucidated. The point was very fully and ingeniously argued at the bar, on both sides; when the counsel for the appellee took a distinction between a case where an officer is seeking to be *admitted*, and one where he is seeking to be *restored* to an office; and insisted that in the former case, his proper and only remedy, is by *information*, in the nature of a *quo warranto*; and therefore (that reme-

(1) The Reporters were not in Court when Mr. Hay's argument was delivered.

dy being complete) a *mandamus* will not lie ; but seemed to admit that, in the latter case, the party might proceed by *mandamus*. I cannot, I own, perceive the force of the distinction, being of opinion, from a number of authorities in the books, that where the important office of Clerk of a Court of Record is the object, a *mandamus* is the proper remedy in either case. But admitting the argument and distinction to be correct, and to give them their full weight, they do not apply to the case now under consideration ; because the appellant is seeking to be *restored* to an office he has once exercised and enjoyed, and of which he has been wrongfully deprived.

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On every view of the case, then, I am of opinion, that the General Court erred in discharging the rule, and that a *mandamus* ought to be awarded to restore the appellant to the office of *Clerk* of the District Court, at the *Sweet Springs*, on his giving bond and security as required by law ; as was done in the case of *James Bland*, who, in the year 1786, was by *mandamus* restored to the office of Clerk of the County Court of *Westmoreland* ; the record of which is now in Court ; and this is the opinion of a majority of this Court.



Pope and others *against* Oliver Towles, who was  
Executor of Thomas Towles, who was Executor  
of Nicholas Lewis.

Wednesday,  
October 19.

AN appeal from a decree of the Superior Court of Chancery, for the *Richmond* District, pronounced by the late Judge of that Court, dismissing, with costs, the bill of the complainants.

If a suit in Chancery abate by the death of the defendant after answer filed, and the cause set for hearing ; if

seems, that his executor cannot regularly demur to the equity of the bill, or plead any matter which the testator himself might not have pleaded in that stage of the proceedings ; but, if no objection be made, and the parties afterwards proceed to take depositions, it will be an implied waiver of any objection to such irregularity.

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*Nicholas Lewis*, being indebted by bond to *John Wily*, the latter brought suit thereon, in the General Court, and employed *Mr. Duval*, an attorney of that Court, to conduct it. Pending the suit, he gave *Mr. D.* (to whom he is stated to have been indebted,) an order on *Lewis* for 12,000lbs. of tobacco, which appears to have been the principal of the debt mentioned in the bond. On the same day, he drew an order on *Duval* for 4,500lbs. of tobacco, in favour of *Mr. Pope*, and at subsequent periods it is alleged that he drew two separate orders on him, in favour of the two other complainants; all which *Mr. Duval* accepted conditionally.

*Wily's* order on *Lewis* is not pretended to have been accepted by him, or even presented to him, in his life-time, and probably was only meant as an authority to *Mr. D.* to receive the debt of *Lewis*, when recovered, and to pay himself out of it. *Lewis* died after a judgment was confirmed in the office, but before the ensuing term, as is alleged. The Clerk probably not being informed of his death, the judgment was entered up, as a final judgment of the *October* term of 1783. No abatement of the suit was ever entered, nor any execution sued out upon it, nor any *scire facias* to revive it, as far as appears. It stands as a regular judgment of that Court; though, if the fact as above stated be true, liable to have been reversed by a writ of error, *coram vobis*, if applied for in due time. The bill states, that *Thomas Towles*, the executor of *Lewis*, being informed of the above circumstances, often promised *Mr. D.* that if he could be satisfied the tobacco "recovered by the said judgment," was not due on account of *gaming*, he would discharge the same, provided he should recover certain slaves of one *White*, for which he had brought suit; and that he gave the like assurances to *Mr. Pope*, and to *Chiles*, another of the plaintiffs, if they would wait with him till the event of the suit, against *White*, should be known, and he should recover the slaves; to which the complainants and *Duval* agreed: after which, the latter procured an affidavit of one *Charles Yancey*, and the certificate of one *William Pettit*, each shewing that the tobacco due on the bond, was on a

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fair contract, for value received ; of which he gave notice to *Thomas Towles*, the executor, who thereupon promised to pay the tobacco, if he should recover the slaves of *White*; which he did, prior to the year 1788 : after which he refused to pay the tobacco. "Whereupon, the complainants directed the said *D.* to commence an action for the recovery of the said tobacco, in the name of the said *John Wily*, but for their benefit, as *Duval's* own claim against *Wily* was THEN OTHERWISE discharged." That he did bring an action accordingly, in which sundry depositions were taken, which, with sundry other papers are annexed to the bill, and prayed to be taken as part thereof ; on some of which, with the indorsations thereon, they rely to shew, that the said *Thomas Towles*, the executor, after *Wily* had become insolvent, and after he knew it, (which they aver to be facts,) fraudulently, and in order to defraud the complainants, procured from *Wily* an order to dismiss that suit, in consideration of a horse, not worth 25*l.* "all which is contrary to equity," &c. They then proceed to interrogate him, whether he did not promise to discharge the tobacco due upon the said BOND, for the use of the complainants, in case it should be PROVED that the same was NOT GIVEN for a GAMING DEBT, &c. and whether the said bond was given for a gaming debt? Whether he had not recovered the slaves ; and whether the complainants had not waited the event of that suit as by agreement? Whether the depositions were fairly taken ; and whether they do not contain the truth? Whether *Wily* was not insolvent, and known to him to be so, at the time he procured from him the order for dismissing the suit brought in his name? And, after some other questions, the bill concludes with a prayer for particular and general relief.

The answer of *T. Towles* states, that he recollects *W. D.* called at his house some time between the years 1781 and 1785, on the subject of the bond due to *Wily*, by his testator *Lewis* ; that, as well as he can now recollect, (*May, 1798,*) *Duval* attempted to convince him the bond was not

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due for a gaming consideration ; but does not *recollect* that he promised to pay the same, if he recovered the slaves from *White*, though he might have said that, if they were recovered, *there* would be enough to *pay the bond* ; nor does he *recollect* having promised the complainants, at any time afterwards, that, if they could convince him the bond was not for a gaming consideration, he would discharge it, if they would wait, &c. nor did he, after seeing *Tancey's* affidavit, and *Pettit's* certificate, promise that he would pay the bond ; of which he is convinced, because he does not recollect, that he was, any time, before or after, *convinced* that the bond was not given for a gaming consideration ; that, when he made the payments to *Wily*, he knew nothing of his insolvency, *and believed him* to be *justly*, *and SOLELY* entitled to receive the payments, if any person was entitled to the amount due on the bond ; that he made several payments, exclusive of the horse, in money and tobacco ; that he always suspected the bond to have been given for a gaming debt, but was not convinced of it until some time after the payment to *Wily*, as will appear by the depositions of *A. Parker* and *T. Davenport*, annexed ; to *which he refers* as a part of his answer ; as also *T. Wash's* deposition ; all of which were taken in *Wily's* suit against him ; and that he does now believe the bond was given for a *horse lent to game with*, as stated in those depositions ; that he does not know that *Wily* was insolvent when he gave the order to dismiss the suit ; and is informed he carried several negroes out of the State when he removed ; admits he recovered the negroes ; believes *Pettit's* certificate was intended to deceive him, inasmuch as it differed from a deposition made by him, which, however, does not appear in the record.

To this answer the plaintiffs replied generally, in *June*, 1798, and commissions were *then* awarded the parties to take depositions ; but no depositions appear to have been taken in the cause, at that time, except those of *William Burrus* and *Anthony New*, both of which relate to a transaction between *Wily* and *Burrus*, in 1782, in which, *New*

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was *Wily's* security for about 25*l.* which he was afterwards obliged to pay with interest, in 1784, 1785, and 1786 ; after which *New* states, that he made frequent inquiry, and understood and believed that he continued insolvent. And in *March*, 1799, the cause was set for HEARING on the PLAINTIFF's motion.

On the 5th day of *March*, 1801, the suit was abated by the death of the defendant, *Towles* ; a subpoena to revive was awarded ; and a bill of *revivor* filed against *Oliver Towles*, executor of the former defendant, *Thomas Towles*, deceased.

The bill prays, that the suit may be revived against him, and that the whole of the proceedings may stand as against him, in the *same* STATE and PLIGHT, as they stood against *Thomas Towles*, in his life-time, and that the complainants may have the same relief against him, as against his testator, unless the said *Oliver* shall shew cause to the contrary.

To this bill of *revivor*, the executor, *Oliver Towles*, appeared, and put in a demurrer, plea, and answer ; to the admission of which no objection appears to have been made. The Chancellor dismissed the bill ; and the complainants appealed to this Court.

*Warden*, for the appellants, contended ; 1st. That the demurrer and pleas of *Oliver Towles*, came in too late to be received and made the grounds of a decree, after an answer by his testator, containing no such matter, and after the cause had been once set for hearing. 2d. That it was necessary to resort to a Court of Equity, to obtain a discovery from *Thomas Towles*, whether he had recovered the negroes from *White*, or not ; therefore, so much of the demurrer as objected to the jurisdiction of the Court, would not avail ; that the plea of the act of limitations could not be sustained, because this suit was instituted the moment the action at law of *Wily v. Towles* was dismissed ; that the act of *frauds* could have no effect, because *Towles* was not called on to pay out of his own estate ; and that the statute against *gaming* could not avail, because *Towles*

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promised to pay the money, if proof were exhibited that it was not a gaming debt ; and the proof to that effect was very abundant.

*The Attorney-General, for Pope, insisted, that as the bill expressly charged a promise by Towles to Pope, which the answer did not deny, but only evaded, there ought to have been a decree in Pope's favour ; especially as Towles had recovered the negroes from White, in which event he was bound to pay ; and had, moreover, by his promise of payment, prevented recourse to Wily ; that the conduct of Towles, in paying Wily himself, after he was cautioned against it, ought to subject him to the payment of the money out of his own estate. On the point of the demurrer and pleas, he cited Mitford's Pleadings, 31. 77. 114. 112. 107.*

*Williams, for the appellee, relied on the following points : 1st. That the promise stated in the bill was never made by Thomas Towles, and, even if it had been, that it was not such a one as ought to bind him ; it being a verbal promise made by an executor, and the object of the suit being to subject him to payment out of his own estate. 2d. That the claim is barred by the act of limitations, if it ever did exist. The promise, as charged, was made in 1785 ; the suit of Wily v. Towles, was dismissed in 1791 ; and this suit brought in 1797. 3d. That if the appellants have any claim, the remedy is purely at law, and not in equity ; and 4th. That the bond from Lewis to Wily, having been given for a horse, clearly proven to have been lent to game with, at the time of playing, was void by the act to prevent unlawful gaming.*

*Friday, November 4. The Judges pronounced their opinions and decree.*

Judge TUCKER, after stating the case as above, proceeded as follows.

The first point stated by the appellant's counsel, as a ground of complaint against the decree, is, that the de-

murder and pleas of *Oliver Towles*, the executor of *Thomas*, came in too late to be received, and made the grounds of a decree, *after an answer* by his testator, containing neither; and after the cause had been once set for hearing.

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As this appears to me to be an important point relating to practice, I shall consider it, before I proceed to the other questions relating to this cause.

If a suit abate by the death of a defendant, before he has put in his answer, and thereupon a *subpoena* to revive is issued against his executor, it would seem, upon principle, (and I make no doubt the practice is according thereto,) that the executor is entitled to defend himself in *any* and *every* way that his testator could have done. We are then to inquire what defence the testator, *Thomas Towles*, could have been admitted to make after answer filed, a general replication, a commission to take depositions awarded, and executed; publication of those depositions made; and the cause set for hearing thereupon? I presume, no further defence could be admitted, at this stage of the proceedings, unless some *NEW MATTER utterly unknown to the defendant* at any former period, or stage of the proceedings, should have been *discovered* by him, since the last step which had been taken in the cause.

Upon suggestion of this *NEW MATTER*, in the nature of a plea *puis darrein continuance* at common law, he might, I presume, be admitted to plead the same, if proper for a plea, or to file an amended answer, stating the *NEW MATTER* thus discovered, but nothing more; as in the case of *Bacon v. Lewis*, senior; (during the present term,) where the defendant, the executor, was permitted, after the cause was set for hearing, to file an amended answer, in consequence of his having discovered a memorandum, written by his testator with a pencil, in an old pocket-book, of which he had no knowledge before. A demurrer, which always lies to a bill for the defects apparent upon the face of it, would then appear to be inadmissible in such a case, and so would a plea, or answer, as to any matter which the defendant might or could have offered in his defence be-



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fore. Upon these grounds, I conceive the executor had no right to demur, plead, or answer to the bill, for or on account of any defect, or cause, of which the testator, *Thomas Towles*, might have availed himself, in either of those modes of defence, before the cause was set for hearing. But, this objection, like every other, may be removed by consent of the opposite party, either express, or NECESSARILY implied. There is no express consent, nor even leave of Court, given to the filing of the demurrer, plea, and answer filed by the executor, *Oliver Towles*, to the bill of revivor. But there is, in the record, what, I conceive, concludes the plaintiffs, the now appellants, from making any objection thereto, in this Court. The *subpœna* to revive was executed, *August 4th*, 1801, and the answer of the executor was sworn to, *April 2d*, 1802; the time of filing it does not appear; but, six days after, we find the deposition of *William Duval*, taken in *Richmond*, in the suit between the complainants, and *Oliver Towles*, the executor; on which occasion, both Mr. *Pope*, the complainant, and the defendant, appeared to have attended, and examined the witness. *Alexander Parker's* second deposition, appears to have been taken in the same manner, at *Fredericksburg*, *July* the 6th, following; and the cause was not heard till the 26th of *September*, 1803, and no objection whatsoever appears in the record to any, or either, of these proceedings. I think, therefore, the plaintiffs must be considered as assenting, or at least, waiving all objections, to the proceedings below, subsequent to the return of the *subpœna* to revive; and, therefore, that it is too late to make the objection here.

But, suppose it were otherwise, and that the cause now stood upon the original bill, answer, exhibits, and depositions. It is difficult to conceive how an order, drawn by *Wily*, on *Nicholas Lewis*, which was neither accepted, nor even presented, to pay to his attorney a debt, for which he had actually brought suit, should attach upon *Lewis's* executor, so as to make him liable, further than the bond itself might make him so. It is still more diffi-

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cult to conceive how that executor could be made responsible for the amount of ORDERS not drawn upon his testator, (or known to him,) but upon the drawee's own attorney, who had the conduct of the suit against *Wily*, and probably, (as the general practice is,) had the bond in his possession at the very time these orders were drawn.

If it had been *Wily's* intention to have transferred the debt to *Duval*, why did he not assign the bond itself to him? The answer might be found in *Duval's* deposition; but I shall not notice it, because that deposition was not taken till after the suit was revived; and I am now considering the case as it stood before. As to all that passed between Mr. *Duval*, Mr. *Pope*, and the executor, *Thomas Towles*, as charged in the bill, it relates only to the payment of the judgment, which had been entered up by mistake, after *Lewis's* death, or of the bond: not a word is said about these orders. *Towles's* promise amounted, then, to no more than what the law itself would compel him to perform, viz. to pay the BOND, if not founded upon a gaming consideration, provided he should have assets, which he admitted would be the case if he should recover the slaves. The complainants evidently understood it so; for they allege that they directed Mr. *Duval* to bring suit upon it, after *Towles* recovered the slaves, and still refused to pay the bond. Suit was brought; but in the name of *Wily*, the original obligor; why did they not, then, get an assignment of the bond, if the tobacco due thereon, belonged to them? But, they charge that the suit was brought for *their benefit*. But they do not charge that *Towles* knew of that matter, otherwise than by referring to Mr. *Duval's* deposition, annexed to the bill, and prayed to be taken as part thereof. The defendant's answer, "that at the times he made the payments to *Wily*, he believed him to be justly, and solely entitled to receive them, if any one was," appears to me to contain a sufficient answer to a charge thus indirectly made, and of which there is no proof whatsoever, except that deposition taken in a suit at *common law*, between *Wily*, plaintiff,

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and *Towles*, defendant; but whether upon the bond in question, or any other, does not appear; there being no copy of any part of the record in that suit, except the dismissal of it at the plaintiff's costs. The depositions taken in that cause, though annexed to the bill, as exhibits, and prayed to be made a part of it, certainly can be no evidence against *Towles* in *this* cause, without something more to substantiate them. The answer then stands wholly uncontradicted in every particular; even as to the defendant's knowledge of *Wily's* insolvency, if that were the fact. Taking the case then as it stood at the time the suit abated, I am of opinion that the bill ought to have been dismissed. But, if the irregularity of the proceedings, after the suit was revived, be cured by the complainant's consent, *necessarily* implied from the circumstances before noticed, I can entertain no doubt that the bond was given for the value of a horse lent to game with, at the time of playing, and therefore void, under the statute against gaming; (a) and that there is nothing in this case to take it out of the statute; consequently, that the decree of dismissal ought to be affirmed.

(a) *Laws Virginia*, 1794, c. 96.

Judge ROANE. There is no error in the decree; and it ought to be affirmed.

Judge FLEMING. It appears by the depositions of *Alexander Parker* and *Thomas Wash*, that the bond executed by *Nicholas Lewis* to *John Wily*, in *August*, 1781, conditioned for the payment of 12,000lbs. of tobacco, (which bond is the foundation of this controversy,) was given on a *gaming* consideration, (of which *Thomas Towles*, executor of *Lewis*, had always a strong suspicion,) being for a horse worth about 12*l.* or (at that time) about 3,000lbs. of tobacco, and lent by *Wily* to *Lewis* for the express purpose of gaming; with this condition, that, if the latter lost the horse, he should pay him 12,000lbs. of tobacco, which being the case, he,

next morning, with *Samuel O. Pettus*, and *Gabriel Poin-dexter*, his securities, executed the bond to *Wily*.

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Whatever irregularities may have taken place in the proceedings in Chancery, subsequent to the revival of the suit against the appellee, as executor of *Thomas Towles*, the case being *rotten* in its foundation, cannot be supported. I am therefore of opinion, that the bill was very properly dismissed, and am for affirming the decree, which is the unanimous opinion of the Court.

### Newby's Administrators against Blakey.

THE appellants instituted an action of detinue in the District Court held at *King and Queen Court-House*, for the recovery of the following negroes, viz. *Charles, John, William, Butler, Solomon, and Milsey*. The defendant pleaded *non detinet*, on which issue was joined. At the trial, the parties agreed a case, from which the following statement is extracted.

A plaintiff in detinue, who, after having had five years peaceable possession of a slave, acquired without force or fraud, loses that possession, may regain it on the mere ground of his previous possession; on the same principle that a defendant may protect himself, on that length of possession, under the act of limitations. But such recovery will not affect the rights of others, not parties to the suit.

*William Chowning*, in the year 1783, made a division (without deed) of certain of his slaves among his children, in which the negro *Priscilla* fell to the lot of his daughter, *Elizabeth Chowning*. In *July*, 1784, he made his will, whereby he devised to his children the several slaves which he had given up to be divided, and particularly *Priscilla* to his daughter, *Elizabeth*, with the following clause or proviso. "But if either of my above mentioned daughters should die, without LEAVING issue, then their parts to be equally divided between my surviving daughters." He died in 1786, and appointed *John Chowning, Henry Chowning*, and the present defendant, *Churchill Blakey*, his executors, all of whom qualified as such.

*Elizabeth Chowning*, the daughter, survived her father, In *January*, 1784, she made her will, whereby she directed that her estate should be divided between her sisters and

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their heirs; that is to say, to her sisters *Anne Blakey*, (wife of the defendant,) *Catharine Chowning*, and *Lucy Chowning*, each one-fourth part; and the remaining fourth part to be equally divided between *Catharine Taylor*, *Anne C. Taylor*, and *John Bristow*, children of a fourth sister: "and if either of them should die without an heir lawfully begotten, then to return and be equally divided among the above mentioned persons," &c. *John Bristow* died in her life-time. Of her will, she appointed the same *John Chowning*, and *Churchill Blakey*, who were also executors of *William Chowning*, her executors, and died in 1788. They qualified as her executors also; and, in 1789, her estate was divided pursuant to the directions of her will, by order of *Middlesex County Court*, no suit having been instituted for that purpose, either *friendly* or otherwise. *Priscilla* and her son *John*, were allotted to *Anne C. Taylor*, an infant, and *Charles*, to *Catharine*, afterwards wife to *Oswald Newby*, the plaintiff's intestate. *Newby*, as husband of *Catharine*, and guardian of *Anne C. Taylor*, acquired possession of all the slaves allotted to them respectively. *Anne C. Taylor* died in *October*, 1794, unmarried, and an infant, her sister, *Catharine*, (then the wife of *O. Newby*,) surviving her, who died in *November*, 1794, leaving issue by *Newby*, a daughter, who died the next year, about twelve months old. *Oswald Newby* obtained administration on the estate of *Anne C. Taylor*, and retained possession of her slaves, as well as those allotted to his wife, until his death, in the spring of 1800; having had the slaves in the declaration mentioned in his possession, from the death of his wife, in 1794, being upwards of five years. The slaves, *William*, *Butler*, *Solomon*, and *Milsey*, were born of *Priscilla*, after the death of *Anne C. Taylor*. The plaintiffs, after the death of *Oswald Newby*, succeeded to the possession of these slaves, (as his administrators it is presumed.) In *June*, 1800, the defendants obtained possession of them, but in what manner is not stated.

The District Court gave judgment for the negro *Charles* only, who had been allotted to *Catharine Chowning*, after-

wards the wife of *Oswald Newby*; but the plaintiffs claiming also the negroes and their descendants, who had been allotted to *Anne C. Taylor*, took an appeal to this Court.

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This cause was argued at the last term by *Botts* and *Al-Rae*, for the appellants, and by *Wickham*, for the appellee. Among the various points submitted by counsel, the only one on which the cause turned, was that made by the counsel for the appellants, "That the possession of *Oswald Newby*, of the slaves, for more than five years, gave him a title to them, and would enable his representatives to regain that possession, on the same principles which operate in cases of ejectment."

*Curia. adv. vult.*

Thursday, October 20, 1808. The Judges delivered their opinions.

Judge TUCKER, having stated the case as above, proceeded:

It was observed by Mr. *Wickham*, that in the case agreed, it is not stated, or agreed, whether the slaves in question were the property of *W. Chowning*. I shall, however, consider them as such, it being agreed that his daughter derived her possession of them from him, at the time he delivered them up to be divided among his children. If this delivery was accompanied by a deed for the slaves, it ought to have been so stated; if it were not, no estate in the slaves passed to the children of *W. Chowning*, under the act of 1758, chap. 1. against fraudulent gifts of slaves, (a) as was adjudged in this Court, in *Turner v. Turner*, (b) and in a still earlier case, *Taylor*, executor of *Rowley*, v. *Wallace and wife*. (c) *Elizabeth Chowning's* title was, therefore, under the will of her father. If she died without leaving issue, the remainder, limited to her surviving sisters, took effect from that period, which was in 1788. The defendant, *Blakey*, who was her executor, and also executor

(a) See *L. J. edit.* 1769. p. 353.  
(b) 1 *Wash.* 139.  
(c) *November term, 1787, MS.*

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(a) See *Fitz-  
hugh v. Foote*,  
3 Call, 13.

of her father, must be considered as a party, or privy to the order of *Middlesex* Court, for the division of her estate, and as consenting thereto. He was, and is, therefore, I conceive, bound thereby; that order having never been appealed from or reversed.(a) The title and possession of *Anne C. Taylor* and *Catharine*, under the will of *Elizabeth Chowning*, commenced from the time that division was made, on the 26th of *October*, 1789. Being consummated with the consent of the executor both of the father and the daughter, it had a legal commencement, and from that period the act of limitations began to run in their favour, against all persons upon whose claims that statute could operate. Whether *Anne Blakey*, the wife of the defendant, survived her sister, or not, does not appear: nor does it appear, whether the other sisters of *Elizabeth Chowning* survived her, or if they did, that they were either infants or *feme covert*s. As to them it is immaterial; and equally so, in the present contest, whether *Anne Blakey* survived her sister, since the present defendant is one against whom the statute would immediately begin to run, although his wife, if she survive him, may not be barred by it. If, indeed, the limitation in *Elizabeth Chowning's* will be good, the period from whence the operation of the act of limitations is to be computed, will be postponed to *October*, 1794, when *Anne C. Taylor* died; or, perhaps from the time that administration on her estate was committed to *Owald Newby*; though I incline rather to the former. But I am of opinion, that the limitation over, "in the event that either "of her legatees should die without heir lawfully begotten," is void, as being too remote, as has been repeatedly decided in this Court.(b) On the other hand, I think the limitation in *William Chowning's* will, is a good one; (c) consequently, I refer the commencement of the act of limitations, in favour of *Anne C. Taylor* and *Catharine Taylor*, to the 26th of *October*, 1789, about five years before the death of *Anne C. Taylor*, and more than ten years before

(b) *Goodwin v. Taylor*, &c. 2 Wash. 74. *Wilkins v. Taylor*, April, 1804, MS. *Hill v. Burrow*, and *Tate v. Tally*, 3 Call, 342. 354.

(c) *Dunn v. Bray*, 1 Call, 338. *Higginbotham v. Rucker*, 2 Call, 316. *Smith and wife v. Chapman*, 1 Hen. and Munf. 240.

the death of *Oswald Newby*, his *administrator* and *heir*, in right of his wife, who survived *Anne C. Taylor*, and appears to have been her next of kin. The slaves having come to the plaintiffs, as administrators of *Oswald Newby*, after a possession of *ten* years, such a possession, I conceive, is sufficient to entitle the plaintiff to recover the slaves against any person or persons whatsoever, except such as may have a right which is not barred by the statute of limitations before their possession may have accrued. And even in that case, I wish it to be understood, that the possession of the defendant thus to be protected, ought to have been legally and peaceably acquired, and not by any tortious act. In what manner the present defendant acquired his possession, is not stated, nor do I deem it material; because, as against him, the act of limitations began to run in *October, 1789*, by his express or implied act and consent. And as he was completely barred by the act of limitations, before *Oswald Newby's* death, I hold he cannot protect his possession, however acquired, against the claim of the present plaintiffs; for having voluntarily (as there is every reason to presume) delivered the slaves to those persons under whom the plaintiffs claim, with the additional sanctions of an order of Court, he cannot now set up his right either as executor of *William Chowning*, or as remainderman, in right of his wife, under the will of *William Chowning*, against his own act as executor of *Elizabeth Chowning*, for the same reason, that in an ejectment, a man cannot object his own possession for twenty years, against his own deed given within that period, as was adjudged in the case of *Duval v. Bibb.*(a)

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(a) 3 Call, 362.

Upon the whole, although the case agreed, is one of the most confused and defective that probably was ever submitted to a Court of Judicature, I am inclined to think there are facts enough to enable us to decide 'as between the present parties) in favour of the plaintiffs' right to recover *all* the slaves in the declaration mentioned, instead of part only, as the District Court have decided.



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I therefore am of opinion, that the judgment be reversed, and the cause sent back, with directions, as agreed on in conference.

Judge ROANE. The case of *Dunn v. Bray*, is almost precisely similar to this case, as it respects the limitation over, in the will of *W. Chowning*, and is decisive to prove, that that limitation is good. The words "die without leaving issue," &c. are, on the authority of that case, to be considered as restrictive to the time of the death, and *Elizabeth Chowning* not having had issue at all, the property in the slave *Priscilla*, and her increase, passed, under that will, to the surviving daughters of *W. Chowning*. *Elizabeth Chowning* had, therefore, no power to dispose of the slaves in the declaration mentioned; and, consequently, if this case (as between the now parties) were not affected by length of possession, and by the division, by consent, of the property left by *E. Chowning*, as found by the case agreed, I should be of opinion to require the case to be supplied, by finding, that *W. Chowning* had a property in the slave *Priscilla*, so as to let in and sustain the exclusive claims of his surviving daughters. *Elizabeth Chowning* having then no power to dispose of these slaves, it is unnecessary to inquire whether the limitation over in her will is good, or too remote, and consequently void. In the first case, (admitting her power to dispose,) *Oswald Newby* would succeed in right of his wife, by virtue of the will, to the share of *Anne C. Taylor*, who died intestate, and without issue: and in the last case, he would succeed to the same share under the general law of distributions. But, with respect to the share of *Bristow*, it was lapsed, by his death, in the life-time of the testatrix, and would pass as her undisposed estate, not to *Newby*, but to her several distributees: (a) and this, *a fortiori*, since the right of survivorship had been previously abolished by our act of 1786. *Newby*, therefore, or those under whom he claims, was invested, by the division stated in the verdict, not only with

(a) 1 P. Wms.  
700. Bagwell  
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property belonging to the other daughters of *W. Chowning*, by virtue of his will, in consequence of *E. Chowning's* dying without leaving issue, but also with this portion of property, (*Bristow's*), to which even the will of *E. Chowning* would have given him no exclusive title. Thus it is evident that the division in question was grounded upon an entire misconception of the rights of the parties. It, however, put *Taylor's* orphans into possession of the negroes. As to the negro, *Charles*, *Newby* has been possessed of him more than five years, before the institution of the suit, claiming him in right of his wife: and he has also been possessed of the others, as representing *Anne C. Taylor*, and claiming under her for the same period. This possession affords a complete bar, under the act of limitations; and, I think, will enable the plaintiff to recover where he has lost the possession, and appears in the character of plaintiff.

The decision in this cause, however, can only bind the parties to this suit, and not the other sisters. THEY have not agreed to the facts, on which this decision is founded; and whenever they may think proper to sue, the case will be as open to them, as it was to the appellee, *Blakey*. We only say, that, as between the parties to this suit, it appears by the facts agreed to by them, that the appellants have a right (by reason of the length of possession) to recover all the slaves mentioned in the declaration.

I am, therefore, of opinion, that the judgment be reversed, and entered for the plaintiffs, for all the negroes in controversy.

Judge FLEMING. *Elizabeth Chowning*, having died without leaving issue, took only an estate for life in the slave *Priscilla*, under the will of her deceased father, *William Chowning*, (in which will she was bequeathed by the name of *Sillet*,) consequently *Elizabeth Chowning* had no right to dispose of her, or any of her increase, by will.

The legacy given by her will to her nephew, *John Bristow*, who died an infant, in the life-time of the testatrix,

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became, on his death, a lapsed legacy, and subject to distribution, in the same manner as if she had died intestate, as being undisposed of by her will; and so much thereof as consisted of part of the estate, (to wit, negroes,) bequeathed to her by the will of *William Chowning*, for life, was subject to distribution amongst her sisters, and their legal representatives only; being controuled by the said *William Chowning's will*; and the residue thereof, to be distributed, one moiety to her mother, (if living,) and the other moiety, in equal portions, among her sisters and brother, or their legal representatives.

After the death of *Elizabeth Chowning*, a division of her estate took place, under an order of *Middlesex County Court*, and by consent of all parties, in *October, 1789*. The estate was divided by commissioners appointed for the purpose, into four equal parts, value about 69*l.* 17*s.* each. No. 1. was allotted to *Churchill Blakey*, the defendant in this suit, in right of his wife, who was a sister of the deceased *Elizabeth*. No. 2. in which were included *Priscilla* and child, was allotted to *Catharine* (wife of *Oswald Newby*) and her sister, *Anne Chowning Taylor*, as *William Taylor's* orphans, whose mother was also sister of the said *Elizabeth*. No. 3. was allotted to *John Chowning*, in right of his wife *Catharine*, who was also a sister of the said *Elizabeth*; and No. 4. (in which was included *Alice*, another negro bequeathed by the said *William Chowning* to the said *Elizabeth* for life,) was allotted to *Henry Street*, in right of his wife *Lucy*, who was likewise a sister of the said *Elizabeth Chowning*. *Churchill Blakey*, the present defendant, *John Chowning* and *Henry Street*, who had married sisters of *Elizabeth Chowning*, the two former of whom were also executors of *William Chowning* and of *Elizabeth Chowning*, and were legatees and distributees of the estate of the said *Elizabeth*, in right of their wives respectively, consented to, and acquiesced in the division of her estate; each of whom took an equal fourth as his dividend thereof.

It seems to me that, in the will of *Elizabeth Chowning*, the limitation over to the surviving sisters, in case of the

death of either of them *without an heir lawfully begotten*, is too remote as tending to a perpetuity, and therefore void.

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On the death of *Anne Chowning Taylor*, in October, 1794, to whom *Oswald Newby*, the intestate of the appellant, had been appointed guardian, having previously married her sister, *Catharine Taylor*, her estate (including *Priscilla* and *John*, two of the slaves in the declaration mentioned) was appraised, and the said *John Chowning* was one of the appraisers, and the appraisement, under his hand, returned to *Middlesex County Court*, in June, 1795; a division of the estate between the two sisters having taken place some time before, on which, (as has been already noticed,) *Priscilla* and *John* were allotted to *Anne Chowning*; and *Sarah*, *Harry* and *Charles*, to her sister, *Catharine Newby*, who died about the 15th of November, 1794, leaving, by *Oswald Newby*, a daughter, who died at the age of twelve months.

It is stated in the agreed case, that *Oswald Newby*, guardian to *Anne C. Taylor*, was in that capacity possessed of her slaves, *Priscilla* and *John*; and that, after her death, he obtained administration of her estate, and, in that character, reduced into possession the slaves, *Priscilla* and *John*, who were afterwards appraised as the estate of *Anne C. Taylor*, as before noticed. *Oswald Newby*, on his marriage with *Catharine Taylor*, became entitled to all her interest in the slaves reduced into possession; and being in possession of those of *Anne C. Taylor*, both as her guardian and administrator, it seems to me that there was no necessity for his making an election publicly in which capacity he held them, but might hold them in that which seemed most beneficial to himself.

As to the conversation stated to have taken place between *Oswald Newby* and his overseer, in 1797, I think that it ought to have no influence on the decision; and am of opinion, that the long and peaceable possession of the slaves in question, acquired without fraud or force, gave to *Oswald Newby* a legal title to them; and consequently, that the

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judgment of the District Court is erroneous, and ought to be reversed, and judgment entered for all the slaves in the declaration mentioned in behalf of the appellants, as administrators of the said *Oswald Newby*, deceased, but without prejudice to any other person or persons who may claim title to any of the said slaves, and are not parties to this suit; and that, according to the agreement of the parties, by their counsel, at the trial in the District Court, on the cause being remanded thither, a jury be impanelled to ascertain the value of the said slaves respectively, in the declaration mentioned; and to ascertain the damages sustained by the plaintiffs as claimed in their declaration, and, when so ascertained by verdict of a jury, that judgment be entered for the same, with costs.

The judgment of the Court was, "that the long and "peaceable possession of the slaves in question, acquired "without fraud or force, gave to the said *Oswald Newby* a "legal title to them," and, consequently, the judgment of the District Court was erroneous. Judgment for the appellants, for the negroes *Priscilla, Charles, John, William, Butler, Solomon, and Milsey*. "But the judgment to be "without prejudice to any other person or persons who "may claim title to any of the said slaves, and are not parties to this suit." The cause remanded to the District Court, that, according to the agreement of the parties by their counsel, at the trial in the said Court, a jury may be impanelled to ascertain the damages sustained by the appellants as claimed in their declaration, and that judgment be entered for the same, when ascertained, with costs.

**Pollard against Patterson's Administrator.**

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Thursday,  
October 20.

A CONTROVERSY having arisen between *Robert Pollard* and *David Patterson*, concerning the proceeds of a sale of 75,000 acres, belonging to the latter, which the former had sold to *Robert Morris*, of *Philadelphia*; a compromise took place between them, on the 22d day of *September*, 1796, by a written covenant under their hands and seals, which recited the sale to have been made "in *December*, 1794, for six pence, *Virginia* currency, per acre, "payable, the sum of 300*l.* in sixty days, the further sum "of 300*l.* in ninety days, and the balance at three equal "annual payments, for which the said *Morris* gave his "bonds to the said *Pollard*;" stated "the land to have been "the property of the said *Patterson*, and conveyed by the "said *Pollard* through mistake;" and then proceeded thus: "Now these presents witness that, to accommodate all differences between said *Patterson* and *Pollard*, the said "*David Patterson* obliges himself to make to *Robert Pollard* a general warranty deed for the land, and the said "*Robert Pollard* hereby obliges himself, his heirs, &c. to "pay to said *Patterson*, the sum of six hundred pounds in "specie, deducting therefrom his acceptances to *James Ternan* and *Lauchlan M'Lean*; one hundred pounds of "the money to be paid to his order, in *Philadelphia*, by "the first of *November* next, and the balance as said *Patterson* may call for it. The residue of the sum due for "the sale of the land, he is to furnish notes of *Robert Morris*, or *Morris* and *Nicholson's*, allowing interest on them "from the time those granted to *Robert Pollard* became "due; and the said *Pollard* hereby relinquishes all claim "for commission, which, under an agreement with *David Patterson*, he had a right to charge."

The true construction of the 29th section of the act reducing into one the general acts concerning the High Court of Chancery (*Rev. Code*, 1 vol. p. 66.) is that, if it appear from the face of a bill that the matter thereof is not proper for a Court of Equity, it should be dismissed; even "after answer filed and no plea in abatement to the jurisdiction of the Court."

It appeared that the money which *Pollard* was to pay under this contract, was all paid on and before the 25th of *October*, 1796, on which day he also assigned to *Patterson*,

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a bond of *Robert Morris*, dated *December 11th, 1794*, and payable *December 11th, 1796*, for 425*l.* *Virginia* currency, (which bond appears to have been one of those taken for the purchase-money of the land,) but with a credit indorsed of 400*l.* on account of a purchase of military lands. The assignment was "*without recourse*," and attested by *David Patterson*, junior. On the 24th of *January, 1797*, *Pollard* wrote to *Patterson*, informing him that he had contracted with a gentleman in *Philadelphia*, for the same amount of *Morris's* and *Nicholson's* notes that he owed him; and, fearing his son might leave that place without his seeing him, had requested the notes to be sent to himself by post; and that he, the said *Patterson*, should be advised as soon as they should arrive. To this letter no answer from *Patterson* appears in the record. In the month of *March*, following, *Pollard* sent him a note of *Robert Morris*, indorsed by *John Nicholson*, for 1,350*l.* payable the 5th of *March, 1798*, a few months after *Morris's* last bond became due; the sum expressed in which note was equal to the principal and interest of the notes expressed in the agreement: but *Patterson* refused to accept it, (*Morris's* notes having at that time greatly depreciated,) and afterwards brought suit in the late High Court of Chancery, against both *Pollard* and *Morris*.

In his bill he stated a variety of circumstances concerning the transactions between *Pollard* and himself prior to the compromise, but did not allege any *fraud* to have been practised upon him, in obtaining the compromise, except "that *Pollard* assured him of his confidence in the credit of "*Robert Morris*, (to whom he had sold the said land,) and "thus induced him to enter into the agreement. He further "stated, that, living in a part of the world remote from "mercantile information, he continued in the determination "to receive the notes of the said *Robert Morris*, until the "month of *March, 1797*, when the note for 1,350*l.* was "offered him which he refused to accept;" "that the said "*Robert Pollard* was perfectly acquainted from time to time "with the decline of the credit of the said *Morris* and

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" *Nicholson*; that in *March*, 1797, their notes were de-  
"preciated to almost nothing, and the note for 1,350*l.* was  
"acquired by the said *Pollard* at not more than one shilling  
"in the pound, or thereabouts, and not for the lands afore-  
"said; that the said *Pollard* had actually made great benefit  
"from the bonds which he had received on account of the  
"land aforesaid; that *Robert Morris* was seised in fee-  
"simple of the said land; that, if he, the plaintiff, had no  
"recourse against the said *Morris*, it must be because the  
"notes or bonds given by the said *Morris*, had been duly  
"satisfied; and, if they had been duly satisfied, the advan-  
"tage taken of him, the plaintiff, by the tender of a paper  
"depreciated to the lowest degree, was, in the said *Pollard*,  
"against conscience; and, if the price stipulated by the  
"said *Morris*, had not been duly paid, then the said lands  
"were liable to the plaintiff for the purchase-money unpaid."

The prayer of the bill was, that both the defendants should be held to answer, &c. that *Pollard* should discover the value of the military lands purchased with the 400*l.* part of the bond aforesaid, which the plaintiff alleged were of great value; should state how he had disposed of the other bonds, or notes, given for the said purchase-money; what was the market value of those bonds and notes when he received them; and what was the like value of the note for 1,350*l.* when tendered as aforesaid; that *Pollard* might be decreed to pay the real value of the 75,000 acres of land aforesaid, with interest, after deducting the payments already made; or, otherwise, that the land might be subject, in the hands of *Morris*, as a security for such value.

No answer was put in by *Morris*; and no further steps appear to have been taken against him.

The defendant, *Pollard*, filed his answer, in which he gave a detail of the circumstances, prior to the compromise, differing in many respects from the allegations in the bill, and stated that he believed the bonds which he took of *Morris* for the purchase-money of the 75,000 acres, still remained unpaid, except the credit of 400*l.* indorsed by him for the purchase of military lands; that the contract of



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*September 22d, 1796*, was fair on his part, and he was ready and willing to comply with it; that, never having bought or sold any of *Morris's* or *Nicholson's* paper, except the note in question, he knew nothing of their value from time to time, and never practised or meditated any thing like fraud or imposition in any part of the transactions which took place between him and the plaintiff.

An amendment to this answer was filed on the 11th of *January, 1799*, stating that, after the sale had been made of the 75,000 acres belonging to the plaintiff, it was agreed to substitute other 75,000 acres, the property of the respondent, which agreement was dissolved by mutual consent, and that of *September 22d, 1796*, was formed in its stead; that the "*respondent had repeatedly offered to reinstate the former agreement, and was still willing to convey to the plaintiff the said last mentioned tract of 75,000 acres, on his returning the money paid him by the respondent.*"

Many depositions were taken in this cause; from some of which it appeared that, in *September, 1796*, *Morris's* notes were worth about 6s. 8d. in the pound; that, in *February, 1797*, they were offered for sale at 1s. 6d. in the pound; that their decline in value was gradual and notorious in the City of *Richmond*, during the interval between those dates; and that the bonds which *Pollard* took of *Morris* for the land as aforesaid, had been traded away by him, but had never been satisfied to those who received them.

The deposition of *Lauchlan M'Lean* was, that in *June, 1796*, he received a letter from *Patterson*, mentioning that he would stand to *Pollard's* sale of the 75,000 acres of land sold at eleven cents per acre; that, before the deponent saw the said *Patterson*, he went to *Richmond*, and there met with *Robert Pollard*, to whom he shewed the said letter; the said *Pollard* observed that he did not know by what authority the said *Patterson* could mention eleven cents per acre for the 75,000 acre tract which was sold through mistake to *Robert Morris* of *Philadelphia*, in *December, 1794*; one thousand dollars payable at sixty days, another thousand dollars in ninety days, and the balance at distant

payments ; and that the said *Patterson* had insisted on the sale of his own land, when he, the said *Patterson*, could have got ten cents per acre in *Swann's* notes, which were good ; that *Pollard*, at the same time observed, the reason why the sale did not take place was, that the said *Patterson* refused to make the warranty required ; that the deponent had a right to claim at ten cents per acre for his interest in the said 75,000 acres, and that, by the said *Patterson's* insisting on the sale to *Morris*, the said *Pollard* had a right to oblige *Patterson* to take *Morris's* notes for the balance over the two thousand dollars which the said *Pollard* had received from *Morris* : the deponent then asked the said *Pollard* what difference it would make ; he replied he did not know ; but that he should make considerably by it, as *Morris's* notes due at so long a period *could be bought very low* ; the affairs of *Morris* and *Nicholson* being looked upon by many persons to be in a bad way ; that *Pollard*, at the same time, expressed considerable resentment against *Patterson*, and said " I wish you may work him well ; " that the deponent asked him what he would make out of *Patterson*, to which he replied (to the best of the deponent's recollection) three thousand dollars ; that, in an after conversation on the same day, the deponent asked him *in confidence*, whether he thought it would not be well for him to exchange *Swann's* notes, which were considered of equal value to any, for *Morris's*, calculating upon getting a difference between them ; whereupon, *Pollard* spoke favourably of *Morris*, and seemed to recommend the measure from his good opinion of him, observing, at the same time, that he had done considerable business with him, or for him ; that the deponent's idea of the exchange of the notes was, that he was to get *two or three for one*, though this was not communicated by him to *Pollard* ; and that the deponent had formerly been interested in the land, about which the suit was depending, but was no longer ; *Patterson* having purchased out his interest and fully paid him for it by two drafts on *Pollard*, drawn in *April* and

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June, 1795, for 350*l.* and 60*l.* and by the payment of 90*l.* to the Surveyor of *Patrick* County.

From the testimony of *John Preston*, of *Montgomery* County, it appeared that *Patterson* applied to and engaged him to locate and have surveyed the lands in question, and informed him that he had engaged with *Pollard* to furnish the warrants, or a part, and they should be laid on a survey of 150,000 acres, the lines of which had been designated shortly after the first contract, and shewn, perhaps, to said *Patterson* with a description of it, and another survey of 40,000 acres which stood in the same state; and that, at or about the time of sending or delivering the said warrants to the deponent, the said *Patterson* employed him to locate and have surveyed a further quantity of 75,000 acres, in the name of *Robert Pollard*. The deponent being asked what he knew respecting *Pollard's* warrants being placed on lands of inferior quality, answered, "as to this, the deponent cannot say any thing material, for *quality* was not sought for in these surveys, in any instance; nor did it appear to be a consideration with *Mr. Patterson*; and neither the survey of 150,000 acres, nor the one of 75,000 acres, was said or supposed to be land fit for cultivation."

The decree of the Court of Chancery was, "the Court being of opinion that the defendant, *Robert Pollard*, ought not to have tendered to the plaintiff notes of *Morris* and *Nicholson*, which that defendant procured after he knew the value of them to be decreasing, but is bound in equity to pay to the plaintiff so much money as is equal to the value of those notes in *Richmond*, on the 22d day of September, 1796;" that the said value be ascertained and reported to the Court by one of its commissioners; from which decretal order, *Pollard* prayed an appeal, which was allowed him; and the suit having afterwards abated by the death of *Patterson*, the appeal was revived against his administrator.

This case was ably and elaborately argued by *Call*, *Hay*, and *Williams*, for the appellant, and *Wickham* and *Randolph*,

for the appellee, chiefly on two points ; 1. Whether the bill had presented a proper subject for the jurisdiction of a Court of Equity ; and 2. If it had not, whether, under the act of 1787, c. 9. s. 2.(a) it was now too late to take advantage of the defect ; no plea in abatement to the jurisdiction of the Court having been filed.

1. The counsel for the appellant insisted that, *on the face of the bill*, there was no ground for the interference of a Court of Equity ; no *fraud* being charged to have been committed by *Pollard* in obtaining the written contract of September 22d, 1796, which, therefore, settled all disputes prior to its date ; the allegation that *Pollard* induced the plaintiff to enter into the contract, by assuring him of his confidence in the credit of *Morris*, not necessarily implying any charge of *fraud* or *concealment* ; because *Pollard* might have thought his assurances well founded, and the plaintiff, being a land speculator, and having a son residing in *Philadelphia*, had the same means of information, which *Pollard* had, concerning the value of *Morris's* notes.

The proper remedy in this case, (if the plaintiff was entitled to any,) was by action of covenant at common law : for this was not a bill for *discovery* ; no discovery concerning the contract being wanted from the defendant, and the plaintiff being as fully possessed of his case before the answer filed, as after it ; for it appears, from his own shewing, that he knew his land had been sold by *Pollard* to *Morris*, and was sufficiently apprised of the circumstances previous to the agreement.

If this should be alleged to be a bill to *rescind the contract*, the case stated is not such as to authorise it : but, in fact, the plaintiff sets up the contract of September 22d, 1796, as the ground of his action, and avails himself of it, at the same time that he seems to wish to rescind it. Neither can it be supported as a bill for *specific performance* ; for, though it be true that such a bill will lie where the specific performance is such as a Court of Equity will enforce conformably with its rules, yet this is where the recovery of

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(a) See *Rev. Code*, 1 vol. c. 64. s. 29. p. 66.

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the specific thing itself is the object of the suit ; not where it is brought, as in this case, for *damages*, or something else in lieu of it.

The fraction of the bond, due from *Morris*, which *Pollard* assigned to the plaintiff, was not a sufficient ground for his coming into equity ; because it does not *appear* from the evidence, though alleged in the bill, that the land remained in the hands of *Morris* ; neither had his claim on *Morris* any thing to do with his claim on *Pollard* ; for the bond was assigned "*without recourse*," and there can be no question that bonds may be sold without the person selling being liable for the ultimate responsibility of the obligors.

On none of these grounds, then, was the bill sufficient to give the Court jurisdiction ; neither did the evidence supply its defects, by making out a proper equitable case.

2. As to the effect of the act of 1787. The words of the act are very broad ; and, unless their construction should be limited, would confer jurisdiction upon a Court of Equity in all possible cases ; such as to enforce payment of money due by bond, or to recover damages in trespass. But the construction of the act should be limited, according to the evident intention of the Legislature, to cases where a plea in *abatement* is necessary, and should not be extended to those where the want of jurisdiction is apparent without such plea. The object of the law was to provide for three descriptions of cases ; 1. Where the bill is properly shaped to give the Court jurisdiction, but the plaintiff omits to produce evidence on the point, and the defendant does not except to the jurisdiction by a plea in abatement ; 2. Where the Court is one of limited jurisdiction, (a Corporation Court, for example,) and, the subject of the bill being, *in general*, proper for the jurisdiction of a Court of Equity, the defendant fails to plead the *particular* exception in abatement ; 3. Where the plaintiff omits to allege facts requisite to make his case proper for a Court of Equity, but afterwards proves them, and the defendant fails to take advantage, by a plea in abatement, of the omission in the bill. In all these cases, the effect of the law is that if the

plaintiff's claim be sustained in other respects, the objection for the want of *jurisdiction* is not to be taken after *answer* filed. But where nothing of the kind just mentioned exists in the case ; where, upon the face of the bill it appears that a Court of Equity had no jurisdiction, and that a *demurrer* properly lay ; it is impossible to suppose that the Legislature intended to give jurisdiction. Such a construction would be unconstitutional ; for, where the case is obviously such that a Court of Law has jurisdiction, the party has a right to a trial at law by a Jury. The expression of the act, "that the Court shall not delay *justice*," means that kind of justice which a Court of Equity is competent to administer.

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A plea in *abatement* either denies the facts alleged to give jurisdiction, or brings into view some *extrinsic* circumstance to defeat it : but a *demurrer* is for a defect apparent on the face of the bill ; and, even after a *demurrer overruled*, the question of jurisdiction is still open for discussion, at the final hearing on the whole evidence, or in the appellate Court.

(a) In this case the bill was susceptible of a *demurrer* ; and it is a universal rule of pleading, that the defendant need never *plead* that the plaintiff has no cause of action, when it appears from his own shewing. (b) Suppose the defendant does not appear, when the bill itself gives no jurisdiction ; can the plaintiff go on and get a decree ? Here, though the matter of fact is taken as confessed, yet, surely, no decree for the plaintiff can be entered : for even consent of parties cannot give the Court jurisdiction. (c)

(a) *Pryor*  
v. *Adams*, 1  
Call, 357. 391.

(b) 5 *Bac. Abr.*  
*Gwil.* ed. 352.

(c) *McCall*  
v. *Peachy*, 1  
Call, 55.

3. It was contended that *Pollard* had a right to tender *Morris's* notes at the time he did ; because no time for the tender was limited in the contract, and a reasonable time to procure such notes ought to have been allowed : indeed, he had a right to do it, at any time, before demand and refusal. It may be said that the note which he offered had some time to run, and therefore, was not such as *Patterson* was bound to receive : but the contract does not say that the notes delivered should be such as *were due*, but *any notes* were to

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be received ; provided the difference of interest should be made up.

4. If the plaintiff be entitled to a specific relief, all that can be done is to direct *Pollard* to procure and deliver him such a note, or notes, as the contract describes.

On the part of the *appellee*, it was said, that *he* would have appealed if *Pollard* had not ; because the decree had not given him the full relief to which he conceived himself entitled. Its true measure was the value of the bonds received by *Pollard* from *Morris*, and traded off by him ; which bonds, having been taken for the *appellee's* land, were in equity, his property, and ought not to have been applied by *Pollard* to his own use. It was urged that *Pollard* was originally a *trustee*, (having sold the land as agent for *Patterson*,) and was bound in conscience to pay him what he received for it ; and that there was no proof that the land had been sold by *mistake*, as he pretended : yet, at the time of the contract in *September, 1796*, he concealed the circumstance that he had actually parted with the bonds taken for it, and farther imposed on *Patterson*, by assuring him there was no doubt of *Morris's* credit ; thus giving his note for the payment of 1,350*l.* of depreciated notes, for so much of *Patterson's* money then in his hands. Here was both *suppressio veri*, and *suggestio falsi*, sufficient to entitle the *appellee* to have the contract rescinded on the ground of fraud and imposition.

If the bill did not *expressly* charge *fraud*, it alleged that *Pollard* had acted *against conscience* ; and the doctrine of Lord *Hardwicke* in the case of the *Earl of Chesterfield v. Jansen* is, that, where the circumstances of a case evolve fraud, it is immaterial how it is charged ; and, in *Mitford*, p. 41. it is said that the plaintiff's claim may be charged in general terms. In this bill there is a general prayer for relief ; and it is unimportant what the prayer is, if a sufficient ground for equitable jurisdiction be made out.

The bill, moreover, prayed a discovery of the value of the military lands, purchased with 400*l.* part of one of the

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bonds, and of the true sum which *Pollard* had received for the other bonds. This, of itself, presented a sufficient case to give a Court of Equity jurisdiction ; so that a demurrer to the bill should have been overruled.

But, even if the Court had not jurisdiction, the defendant having failed to plead in abatement, or to demur to the bill, is prevented by the act of 1787, from now taking exception for the want of jurisdiction. This act (being a remedial one) ought to be liberally construed, and not technically confined to pleas in *abatement* only, but extended to *demurrers* also ; for the evil is the same of permitting the objection to the jurisdiction to be made, after answer filed and *no demurrer* to the bill, as, after answer filed and *no plea in abatement*. This law was taken from the acts of 1787, p. 12. and the *preamble* ought to be taken into view ; which shews that the evils it contemplated to avoid, were the same with those presented by the case now before the Court. Is it not a most intolerable evil that the defendant should waive his demurrer to the bill, permit the plaintiff to go on to a final hearing, and then turn him round to a Court of common law ?

In *reply*, it was observed that the contract of September 22d, 1796, shewed that *Patterson* knew the land had been sold to *Morris*, and on what terms ; for those terms were expressly recited therein ; that by acceding to that contract, he relinquished all claim to the *bonds* which had been taken of *Morris* ; having agreed to take 600*l.* in money and *Morris's* notes, or those of *Morris* and *Nicholson*, in lieu of those bonds ; that he had sanctioned the contract by receiving the 600*l.* in *specie*, and finally refused to accept the note for 1,350*l.* not because he had been *defrauded*, but because *Morris's* notes had *depreciated* ; that the contract itself declared the land to have been sold by *mistake*, and therefore, no farther evidence was necessary ; that all the circumstances prior to the contract, were closed and settled by it, and the plaintiff had no right to found a claim upon them ; no *fraud in obtaining the contract* being either alleged or proved.



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As to the hardship of turning the plaintiff round to a Court of common law, after a final hearing, when a *demurrer* might have been filed in the first instance ;—the difference between a *demurrer* and a plea in *abatement* is, that the former objects to the jurisdiction, *on the face of the bill*, admitting the truth of its allegations ; the latter, either denies them, or sets forth some extrinsic matter, known, perhaps, to the defendant only, to shew that the Court ought not to take cognisance of the case. The *former* is proper where the plaintiff, *from his own shewing*, does not make out a case for a Court of Equity ; the *latter* where the defect *does not appear in the bill*, but is disclosed by the allegations of the defendant. Now, where a plaintiff makes a case not proper for a Court of Equity, it is his own fault, and he ought not to complain if the exception be taken at any time : but, where the objection must be shewn *by the defendant*, (as in the case of a plea in *abatement*,) if he fails to shew it in that way, it is not right to permit him to do so, after answer filed.

Tuesday, November 8. The Judges pronounced their opinions.

Judge TUCKER. This was an appeal from the *Richmond* Chancery Court.

(a) *Rev.*  
*Code*, 1 vol. c.  
64. s. 29.

A preliminary question submitted to the Court on the argument of this cause, depends upon the construction of the act of Assembly, (a) which declares, “that after answer filed, and no plea in abatement to the jurisdiction of the Court, no exception for want of jurisdiction shall afterwards be made ; nor shall the High Court of Chancery, or any other Court, ever thereafter, delay or refuse justice, or *reverse* the proceedings for *want of jurisdiction*, except in cases of controversy respecting lands lying without the jurisdiction of such Court, and also of infants and *femes covert*.”

The remarks of Judge Taylor, in the cases of *Guerrant v. Fowler and Harris*, (b) and again in the case of *Harris v. Munf.* 5.

Thomas,(a) appear to me to be founded on sound reason, and are, I think, well supported by those of Judge Pendleton, in *Pryor v. Adams*,(b) and in *Terrell v. Dick*,(c) as well as by the rules of practice in Chancery, mentioned in *Mitford's Pleadings*, 112. 117. 171. 176. 177. 181, 182. I, therefore, am disposed to adopt the Chancellor's interpretation, that the clause is to be confined to those cases where the jurisdiction of a Court of Equity must be excepted to, by a *plea in abatement*, and not by *demurrer*.

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(a) 1 Hen. &  
Munf. 18.  
(b) 1 Call,  
391.  
(c) *Ibid.* 554.

The parties in this suit, having had some considerable disputes, on the 22d of September, 1796, entered into a compromise. The object of the bill seems to be to open the old controversy again, but without relinquishing the advantages he had already received from that compromise; but I am of opinion, this Court ought not to permit the matters, which it was the object of the compromise finally to adjust and settle, to be again opened. Of this opinion was Lord Hardwicke, in the case of *Puller v. Ready*,(d) in which he says, "There is nothing more mischievous than "for this Court to decree a forfeiture after an agreement, "in which, if there is any mistake, it is the mistake of all "the parties to the articles, and no one is more under an "imposition than the other. This Court is so far from as- "senting to set up the forfeiture again, that they would ra- "ther rejoice at the agreement, because it has absolutely "tied up the hands of the Court from meddling in the ques- "tion:" and in the case of *Hook v. Ross*,(e) I understood this Court to be unanimously of the same opinion. The compromise in the present case, upon the face of it, appears to have been a perfectly fair one, both parties being fully apprised of every circumstance relative to the dispute between them. The complainant acquiesced in it, received 600*l.* on account of it, and, as he alleges in his bill, continued in a determination to receive *Morris's* notes until March, 1797. Pollard informed him by letter of January 24, 1797, that he had procured one for the amount he had to pay, which he had directed to be forwarded by post, fearing the com- plainant's son might have left Philadelphia. The note was

(d) 2 Atk.  
592.

(e) 1 Hen. &  
Munf. 321.

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tendered and refused the 25th of *March*. From the whole complexion of the transactions, as they appear in the record, *Patterson* was as well acquainted with the character and credit of *Robert Morris*, and his notes, or at least had the means of information concerning them, as fully in his power as *Mr. Pollard*. They were notorious objects of speculation, and the whole complexion of the original transaction shews it to have been a job of the same description ; for the surveyor, in answer to the question respecting the relative quality of the two tracts of 75,000 acres each, answers, " that upon that subject, he can say nothing material : for QUALITY was not sought for in those surveys, in " ANY INSTANCE ; nor did it appear to be a consideration with " *Mr. PATTERSON* ; and neither the survey of 150,000 acres, " nor that of 75,000 acres, was SAID OR SUPPOSED TO BE " *land fit for CULTIVATION.*" Suppose there had been no compromise, would this Court, as a Court of EQUITY, interfere to settle a controversy between parties engaged in such a business ? I should suppose it would say to them, settle your disputes, as you can, between yourselves ; this Court will not interfere in the division of your spoils. On these grounds, I think, we ought not to go back beyond the compromise ; and there is no circumstance whatsoever, either in the answers, depositions, or exhibits, which appears to me to warrant the idea, that there was any fraud or concealment on the part of *Mr. Pollard*, or any surprise on *Patterson*.

The deposition of *Lauchlan M<sup>c</sup>Lean* may, perhaps, be considered as proving some duplicity on the part of *Mr. Pollard*. There is no date fixed to the conversation between him and the witness. If it were before the compromise of *September 22d*, it must have had relation to the matters which that compromise put an end to. The witness who was, perhaps, then interested with *Patterson*, ought, if he thought that conversation of importance, to have communicated it to *Patterson* : whether he did or did not, does not appear. *Pollard's* observation respecting the low price at which *Morris's* notes could be got, does not ap-

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pear to have shaken Mr. *M'Lean's* opinion of them, for he asks *Pollard's* opinion as to exchanging the notes of *Swann*, which he seems to have had by him, for *Morris's*. It was in answer to that inquiry that *Pollard* expressed his good opinion of *Morris*, (in which he probably was not singular,) and recommended the exchange to *M'Lean*. No time was limited within which *Pollard* was to procure *Morris's* notes for the balance of 4,500 dollars. He writes *Patterson* that he had purchased them, just four months after the date of the compromise; and *Patterson* never announces his determination not to accept them, till *March* 25th, (two months after,) when actually presented to him. The depreciation to 6s. 8d. in the pound, in *September*, was probably not unknown to *Patterson*, for he was in *Richmond*, the theatre on which they were constantly exhibited to the view of all the world. It was a reasonable supposition that a paper, already so depreciated, would soon fall much lower; and, where any man makes a contract under such circumstances, he must abide by the event, be that what it may. It ought not to pass unnoticed, that Mr. *Pollard*, in his amended answer, states, that after the sale of the 75,000 acres, belonging to the plaintiff, as stated in his original answer, it was agreed to substitute in the place thereof other 75,000 acres, the property of *Pollard*, which agreement was dissolved by mutual consent, and that of *September* 22d, formed in its stead; that he has repeatedly offered to reinstate that agreement, and is now willing to convey to the plaintiff the said last mentioned tract of 75,000 acres, on his returning the money paid him by the defendant. This offer, in my opinion, was such a submission to the jurisdiction of the Court, upon this case, as the defendant could not afterwards retract; and put it into the power of the Court to make such a decree, as a Court of Equity might well make, upon such a bill and answer; but which, in my judgment, it could no otherwise have made, without this concession, than by dismissing the plaintiff's bill. For, as was well observed at the bar, if the object of the bill was

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not to have the contract of *September 22d rescinded*, it must be to compel a specific performance of that which had *already* been specifically performed, as far as depended upon the defendant ; (of course the bill would not hold on that ground ; ) or to obtain *damages* for the non-performance of it as soon as the plaintiff had a right to expect ; which it is the peculiar province of a Court of *Law* to afford, and which it is incompetent to a Court of *Equity* to *assess*.

The only decree then which it was competent for a Court of Equity to make, was, to direct the delivery of the note tendered to the plaintiff, (it being in possession of the Court,) and thereupon to dismiss his bill with costs. But when Mr. *Pollard* had submitted to convey to the plaintiff the 75,000 acres mentioned in his last answer, the Court, I conceive, ought to have adapted its decree to that offer, giving to the plaintiff the alternative of accepting it within a limited time ; in which case, each party ought to have borne his own costs ; or, if that part of the alternative were rejected, or, being accepted, should not be complied with, on the part of the plaintiff by the repayment of the money, then the second branch of the alternative, the acceptance of the note deposited in Court, might also have been permitted within a limited time ; and, if that were rejected, then the bill should have stood dismissed with costs ; and such, I conceive, is the decree which this Court ought now to make ; leaving to the plaintiff, if so advised, to pursue his remedy at law, for any damages to which he may suppose himself entitled by the defendant's delay in making the payment stipulated between them to be made in *Morris's* notes, in case he shall reject the alternative thus offered ; or in case Mr. *Pollard* shall have parted with the 75,000 acres of land, (which he offered in lieu of the other,) and shall thereby have disabled himself now to convey the same. For, as that offer was neither accepted by the plaintiff, nor made the foundation of the Chancellor's decree, I conceive Mr. *Pollard* was at perfect liberty to dispose of the lands as he might think proper.

Judge ROANE. The question made in this case, upon the construction of the act of 1787, is very important, has often occurred in this Court, and ought now to be settled, although, perhaps, the case could well go off without it. This question, as it is *contended* to arise out of the circumstances in this cause, is, whether the omission to plead to the jurisdiction of the Court, gives a power to a Court of Equity to decree in favour of a plaintiff upon a case appearing upon the face of the bill to be merely a *legal* question.

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There is no doubt but that the act *concerning the Court of Chancery*, in which this provision is found, contemplated, *only*, cases in equity. It is clear also that, whatever shades of difference may be found to exist in different adjudged cases on this subject, the partition line between the two jurisdictions is as firmly established by the successive decisions of Courts of Equity, as any point whatsoever. It is as well established that a Court of Chancery ought not to hold cognisance of a case which has no ingredient of equity in it, as in a case where the *value* of the thing in controversy is below the standard established by the act relating to the subject. The established positions, on each subject, should be alike respected by Courts, in forming a construction; and neither should be considered as repealed, but by express words, or a clear and necessary implication. Where the consequence is to be, the prostration of the line of partition between the two jurisdictions, and the letting in *all* cases to the *forum* of the Court of Equity, those words, or that implication, should be extremely strong and clear.

Bearing these considerations in mind, let us consider the question before us. The words of the section are: "After answer filed, and no plea in abatement to the jurisdiction of the Court, no exception for want of jurisdiction shall ever afterwards be made, nor shall the High Court of Chancery, or any other Court, ever thereafter delay or refuse justice, or reverse the proceedings for want of jurisdiction, except in case of controversy respecting lands

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(a) *Rev.*  
*Code*, p. 66. s.  
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(b) *Mitford*,  
p. 99.

(c) *Ibid.* 102.  
176.

(d) *Ibid.* 178.

(e) *Ibid.* 179.

“lying without the jurisdiction of such Court, and also of  
“infants and *femes covert*.”(a) The question is, whether  
the omission to plead *in abatement* to the jurisdiction of the  
Court, will extend to a case plainly appearing, *upon the face*  
*of the bill*, to be proper for the cognisance of a *Court of*  
*Law only*, and not of *ANY Court of Equity*. In such case,  
the ground of defence being apparent on the face of the bill  
itself, the proper mode of defence is by *demurrer*, and not  
by *plea*.(b)

And again, we are told, more particularly, that where it  
appears by the bill that the subject of the suit is not within  
the jurisdiction of A Court of Equity, the proper mode of  
defence is by *demurrer*.(c) On the other hand, when the  
objection to the bill is not apparent on its face, the defendant,  
if he means to take advantage of it, ought to shew it by plea  
or answer. It is true that this writer, in stating the grounds  
of defence by plea, admits, *inter alia*, that a plea is proper,  
where “the subject of the suit is *not* within the jurisdiction

“of A Court of Equity;”(d) but I presume that, in such case,  
that fact is to be made out *aliunde*, and not from the face of  
the bill itself; and a plea of this kind is also considered as  
a plea *in bar*, and not merely *in abatement*.(e) The ques-  
tion then is, whether the Legislature, in this section, con-  
templated any other case than those in which a *plea in abate-*  
*ment*, (or at least a *plea*,) was proper? Of which description  
of cases there are several, as, where the case is proper for A  
Court of Equity, but not *THIS* particular Court; or where  
there is no objection to the *case* made by the bill, but yet  
the suit ought to be abated or barred by reason of some cir-  
cumstance attending the situation of the plaintiff or defend-  
ant, or the like. Could the Legislature, when they used  
this particular expression, (*plea in abatement* to the jurisdic-  
tion of the Court,) have contemplated a case to which a *de-*  
*murrer* (or, at most, a *plea in bar*) was the only proper de-  
fence? The other class of cases just alluded to, will satisfy  
the expressions of the act; and this construction is also  
supported by the *exceptions* in the clause, in relation to lands  
lying without the jurisdiction of the Court, and infants and

*femes covert* : these exceptions fall entirely within that class, in which *pleas* are proper ; and the exception in this case proves the rule.

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But it is said that the *general* words in the latter part of the clause, are so strong as to comprehend every thing. I answer, in the first place, that it is a sound rule of construction, that *general* words in a statute are to be expounded, by reference to the actual case in the contemplation of the Legislature, as evidenced by their words, which here was a ground of defence to which a plea *in abatement*, (or at least *in bar*,) and not a demurrer, was properly applicable ; 2d. That the Legislature is to be presumed conversant of the just rules and doctrines of pleading, and to know the extent and import of any technical terms used by them ; and, 3d. That neither are the words of the act, perhaps, more strong, nor the reasons in favour of a qualified construction less operative, than in other analogous cases in the law, where a restricted construction has been adopted. For example, in the act of *jeofails*, it is said that no judgment after verdict shall be arrested, "for omitting the averment of any matter without proving which, the Jury ought not to have given such a verdict." Now it is clear, that, in *assumpsit*, the Jury ought not to find for the plaintiff, unless a promise be proved ; and yet this clause has been construed not to extend to cases in which a promise is not laid in the declaration. If it be proper that the declaration of a plaintiff at law should (notwithstanding the unqualified terms of the act of *jeofails*) state, in legal form, the ground of controversy, it is certainly equally necessary, that the case exhibited to a Court of Equity should be of a CHARACTER to confer jurisdiction upon that Court.

There is a strong analogy, then, between these two cases ; and as, in a case at law, the Court will not give judgment, (notwithstanding the objection has not been taken,) upon a declaration radically defective, as exhibiting no cause of action ; so although a *demurrer* (for a *plea* in this case would be improper) has not been opposed to a bill containing *on its face* no case for a Court of Equity, but,



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on the contrary, the defendant answers thereto; yet the Court will not grant relief upon hearing the cause. (a) The necessity of having all averments essential to shew a cause of action, in a declaration at law, and that the case submitted to a Court of Equity should be of a character adapted to that jurisdiction, are land-marks which we ought not to lose sight of, in forming a construction upon the acts in question.

I am therefore warranted in saying, that the act before cited, does not authorise a Court of Equity to decree in a case, as made by the bill, of a purely *legal* nature.

As to the particular bill before us, it is, on its face, fully adequate; and, if it were supported by the testimony, or if the facts set out in it were admitted by a demurrer, I should see no objection to sustaining it. It charges fraud and concealment, which, if made out by proof, or admitted, would be competent to give a jurisdiction; but there is no demurrer in the case, and the proofs fall short of the charges contained in the bill.

The agreement of *September*, 1796, closed the previous subject of controversy: the appellant was not bound to state to the appellee what he had done with *Morris's* BONDS; and the appellee does not state that he made any inquiries on the subject, but, on the contrary, agreed to take *Morris's* notes for the amount of the sale. It is not shewn that these notes were to be payable *on demand*, and the contrary is rather inferable, from the agreement to "allow interest" thereupon, from the time those given by *Morris* to *Pollard* became due.

*Pollard*, therefore, complied with his agreement, by tendering the notes mentioned in the proceedings; but having, by his answer, made an offer to convey the other 75,000 acres of land, it should be optional with the appellee to accept the one or the other, in case the land has not been sold since the offer was made, which was not then accepted.

I am, therefore, of opinion, that the decree be reversed, and another rendered conformable to the above mentioned ideas.

Judge FLEMING concurred, and said that, on the point of jurisdiction, he wished it to be understood that the Judges were unanimous in their opinions that, whenever it appears from the face of the bill, that the matter was not proper for the jurisdiction of a Court of Equity, the bill should be dismissed, notwithstanding the defendant did not plead in abatement.

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The opinion of the Court was entered, that the decree of the Chancellor was erroneous in this, "that the defendant, *Robert Pollard*, was thereby bound to pay to the plaintiff so much money as is equal to the value of the notes of *Robert Morris*, or of *Morris and Nicholson*, in *Richmond*, on the 22d day of *September*, in the year 1796, which value one of the Commissioners was directed to ascertain and report." The decree was therefore reversed; "and this Court proceeding to pronounce such decree as the said Court of Chancery ought to have pronounced: it was further decreed and ordered that, as the said defendant, in his answer of the 11th day of *January*, 1799, had stated, 'that he had repeatedly offered to re-instate the former agreement between the parties, and was then willing to convey to the plaintiff the last mentioned tract of 75,000 acres of land, on his returning the money paid him by the defendant;' the representatives of the said plaintiff (who is now dead) shall have their option either to accept the note dated at *Philadelphia*, the 5th day of *March*, 1793, drawn by *Robert Morris*, in favour of *John Nicholson*, and indorsed by the said *John Nicholson*, payable three years after date, for four thousand five hundred dollars, and tendered to the said plaintiff, on the 25th day of *March*, 1797, by *John Staples*, agent for the said defendant, in full discharge and satisfaction of the said contract of the 22d day of *September*, 1796, or to refund to the said defendant, or to his assigns, the money received of him, in consequence of the said last mentioned agreement, with legal interest thereon from the re-

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“ spective dates of the receipts thereof, until the same shall  
“ be repaid ; on the repayment of which, that the said de-  
“ fendant do convey to the representatives of the said plain-  
“ tiff, *David Patterson*, deceased, the last mentioned 75,000  
“ acres of land, with a general warranty ; unless the said  
“ defendant shall have parted with those lands in conse-  
“ quence of the non-acceptance of that offer : and that the  
“ representatives of the said *David Patterson* do, on or be-  
“ fore a certain day to be appointed by the Court of Chan-  
“ cery aforesaid, make their election which of the before  
“ mentioned alternatives they will abide by and perform ;  
“ and, if the said representatives shall not, on or before the  
“ day so to be appointed by the said Court of Chancery,  
“ make such election, and pay or tender unto the said *Robert Pollard*, or to his assigns, the money by him so paid  
“ to, or advanced for the said *David Patterson*, with inte-  
“ rest as aforesaid, then the said bill to be dismissed with  
“ costs.” And the cause was remanded to the said Court of  
Chancery, for further proceedings to be had thereon agree-  
able to the principles of this decree.

Lewis's Executor against Bacon's Legatee and Executors.

AN appeal, taken by one of the defendants from a decree of the Superior Court of Chancery for the Richmond District, pronounced by the late Judge of that Court.

The appellees filed their bill in March, 1792, against the appellant and others, executors of *Fielding Lewis*, deceased, stating, that their testator, *Anthony Bacon*, of London, departed this life some time in the year 1786, having previously by his will, dated the 14th of June, 1785, devised a debt of 2,338*l.* 6*s.* 5*d.* sterling, due him, by account thereto annexed, from the said *Fielding Lewis*, of *Fredericksburg*, in *Virginia*, on the 31st of December, 1773, together with sundry other debts, to the appellee, *William Bacon*; one fourth part whereof was payable to the daughters of the testator's brother, *Thomas Bacon*, of *Maryland*. That *Fielding Lewis* died some time in the year 1782, and,

An *ex parte* affidavit, taken in London, prior to the American revolution, pursuant to the act of Parliament (5 Geo. 2. c. 7. s. 1.) "for the more easy recovery of debts in his majesty's plantations in America," cannot be admitted as evidence to charge the defendant in this country.

balance of other accounts as rendered and agreed, without producing the accounts so alleged to have been agreed, (if in existence,) and proving them as alleged, unless there be proof of the defendant's acknowledgment of the justice of such accounts, or of his promise of payment.

It is not sufficient in an account to charge balance.

A creditor kept an account current with his debtor; and also an interest account, in which he charged interest on the several items of *debit* to a particular period, and gave *credit* by interest on the several payments to the same period, and charged in the account current the balance appearing in the interest account. A balance being then struck, and a new account opened, in which interest was charged on that balance, thus consisting of principal and interest; it was held to be *compound interest*, and not allowable.

If the defendant in equity plead the statute of limitations, and the complainant come within any of the exceptions in the act, he will not be entitled to the benefit thereof, unless he set it forth by a replication.

A testator devised - large real and personal estate to his wife and children; charged the portion of one of his sons with the payment of 1,500*l.* sterling towards his debts; directed sundry tracts of land to be sold, and the monies arising therefrom, as well as from loan office certificates, or otherwise, (after payment of his just debts,) to be equally divided among his six sons. On a bill brought by one of the creditors of the testator, the statute of limitations being pleaded, and the complainant not having shewn that he came within any of the exceptions of the act; it was held that the statute ought not to operate to prevent a recovery of so much of the specific fund as remained undisposed of, but that it would be a bar to a recovery out of the general fund.

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by his will and codicil thereto annexed, devised that sundry tracts of land should be sold by his executors for the payment of his debts, and moreover charged the real estate devised to his son *John*, (the now appellant,) with the payment of 1,500*l.* sterling, to be applied to the discharge of his debts; besides which, he left a large estate, consisting of lands, slaves, and personal estate, which came to the hands of his executors. That they cannot state particularly how those various funds have been disposed of, nor what sales have been made; but charge that the funds were very ample; that the executors had been grossly negligent in effecting sales; pray a full discovery and account, also an account of administration and payment of their debt, and for general relief.

The answer of *John Lewis*, styling himself the only acting executor, was filed in *March*, 1793. He states, "that the executors of *Fielding Lewis* did not know that any sum of money was due to the said *Anthony Bacon*, deceased, from their said testator;" admits that *Fielding Lewis* departed this life, after having made his last will and testament, possessed of a considerable real and personal estate, consisting of 2,300 acres of land in the County of *Frederick*; about 1,250 acres in the County of *Spotsylvania*, wherein the said *F. Lewis* resided; 10,000 acres in the County of *Jefferson* and State of *Kentucky*; one share in the *Dismal Swamp* Company, and one moiety of a tract of land, supposed to contain 800 acres, in the State of *North Carolina*, with sundry other tracts of land and lots of ground in the town of *Fredericksburg*, particularly enumerated; that the executors had sold their interest in the *Dismal Swamp* Company, and in the *North Carolina* lands for 1,350*l.* which, with the 1,500*l.* sterling charged on the estate devised to the defendant *John Lewis*, had been applied to the payment of the testator's debts due in *Virginia*; that the other lands remained unsold, as their supposed value could not be procured; and that the testator died possessed of 91 negroes, and personal estate to the amount of ———,

which were distributed agreeably to the testator's will. To which answer the complainants replied generally.

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Afterwards, at the *September* term, 1793, leave was given, by the Court, to *John Lewis* to amend his answer. His amended answer stated, that since filing his former answer he had discovered in an old pocket-book of his testator's, and in his hand-writing, a memorandum written with a pencil, thus: "Paid Mr. Mercer, for *Anthony Bacon*, 483*l* " Os. 7*d*. April 1, 1776."

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The deposition of *Charles Simms* was taken, which proved, that about the year 1759, (it should be 1789,) the claim of *Anthony Bacon's* representatives against *Fielding Lewis's* estate, was put into his hands for collection; soon after which he called on *John Lewis*, the executor, and informed him of the circumstance; that in the course of conversation on the subject, *John Lewis* acknowledged, that there appeared, from his father's books, to be a considerable debt due from his father's estate to *Anthony Bacon*, and promised to call on the deponent in a day or two in order to ascertain the balance, but failed to do so. This deposition was taken on the 17th of *February*, 1794; and at rules held, in the Clerk's office, during the same month, the cause was set for hearing, on the motion of the plaintiffs by their counsel.

In *April*, 1794, *John Lewis* filed a plea of the statute of limitations; but it does not appear to have been done with leave of the Court.

At the *April* term, 1795, the bill was taken for confessed against *George Lewis*, one of the executors, as to whom the complainants had regularly proceeded; and the Court reserving to *John Lewis* the benefit of his plea, at the final hearing, directed that he should make up an account of his administration, before commissioners then appointed, who were also to state an account between the estates of *Fielding Lewis* and *Anthony Bacon*; and the Court further ordered, that *John Lewis* should produce to the commissioners "all the books in his possession, of his testator, relative to the transactions between him and the testator of the plaintiff."

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On the 6th of *March*, 1802, another set of commissioners was appointed to perform the above order.

The commissioners, on the 10th of *September*, 1802, reported, that they had called on *John Lewis* for the purpose of settling the account, as directed by the High Court of Chancery, when he informed them that it was impossible, all his, and his testator's books, having been consumed by fire on the 3d of *April*, 1799.

The following exhibits were filed : 1. A letter from *Fielding Lewis* to *Anthony Bacon*, dated the 24th of *January*, 1775. In this letter *Lewis* admits a debt, (which from the funds designated for payment, it may be presumed was very considerable,) and promises a remittance, but no precise sum is mentioned. It states the amount of his property and debts, (the latter exceeding \$,000*l*.) and that his last crop of wheat had been reduced by a severe frost early in *May*, to little more than 3,000 bushels, which he was manufacturing into flour in order to ship to the account of *Bacon*, a continuance of whose former indulgence is requested ; that the debt was perfectly secure, our lands being liable for *English* debts, and begs that he would delay sending out a power of attorney to collect the money. He also assures *Bacon* that his estate, after the payment of all his debts, is very ample, and promises him a security to double the amount of the debt, on any part of it.

2. An affidavit of one *James Deane*, book-keeper to *Anthony Bacon*, made before *John Wilkes*, Esq. Lord Mayor of *London*, on the 13th of *April*, 1775, and stated in the certificate of attestation to have been in pursuance of an act of Parliament passed in the 5th year of the reign of his late majesty king *George II.* intituled, "An act for the more easy recovery of debts in his majesty's plantations and colonies in *America*." (1) The affiant swears, that the account

(1) *Stat. 5 Geo. II. c. 7. s. 1.* In any suit, in any Court of Law or Equity, in the plantations, for any debt or account, wherein any person residing in *Great Britain*, shall be a party, it shall be lawful for the plaintiff or defendant, and for any witness, to be examined to prove any matter by affidavit or solemn affirmation, before any mayor or chief magistrate of the city or town

thereto annexed, entitled, "Dr. *Fielding Lewis*, Esq. his "account current with *Anthony Bacon*, Esq. credit;" signed "*Anthony Bacon*," is a just and true account in every particular; and that the interest account thereto annexed is also just and true; that there was then justly due to *Anthony Bacon*, from *Fielding Lewis*, of *Fredericksburg*, in the Colony of *Virginia*, the sum of 2,448*l.* 7*s.* sterling, the balance of the said account; that neither *Anthony Bacon*, nor any other person, by his order or direction, had received any part of the said sum, or any security or satisfaction therefor, to the best of the affiant's knowledge and belief, the affiant giving as a reason for his knowledge in relation to the subject, that he had kept the books of *Anthony Bacon*, and been conversant with his trade and business for more than eight years then last past. The first and principal account of these items are thus stated:—

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"1769, *December* 31st. To balance of account current, as per account rendered and agreed, 1,897*l.* 13*s.* 5*d.*"

"1771. To do. of slave account, as per account current rendered and agreed, 2,565*l.* 6*s.* 6*d.*"

Then follow a few other items for premiums of insurance, amounting to 28*l.* 6*s.* 3*d.* and a charge of 530*l.* 19*s.* 4*d.* being a balance taken from an interest account, in which interest was charged on the several items of *debit* down to the 31st of *January*, 1773, and credit given by interest on the several payments to the same period. After entering these payments to the credit of *Lewis*, (which amount to 2,683*l.* 19*s.* 1*d.*) a balance is struck of 2,338*l.* 6*s.* 5*d.* and carried to

in *Great Britain*, where, or near which, the person shall reside, and certified under the common seal of such city or town, or the seal of the office of such mayor or chief magistrate; and every affidavit or affirmation so made and certified, shall be of the same force, as if the persons had appeared and sworn or affirmed  *viva voce*  in open court, or upon a commission.

*Sect. 4.* The houses, lands, negroes, and other real estate, situate within any of the said plantations, belonging to any person indebted, shall be liable to all just debts and demands, and shall be assets, in like manner as real estates are by the law of *England* liable to the satisfaction of debts due by bond, and shall be subject to the like remedies in any Court of Law or Equity in the plantations, in like manner as personal estates. See *Cay's* 4*br.* tit. "PLANTATIONS," lxiii.



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a new account. Interest is then charged on that balance, thus compounded of principal and interest, to the 13th of April, 1775, amounting to 150*l.* 5*s.* 7*d.* and a credit of 40*l.* 5*s.* omitted in 1772, entered, leaving a balance of 2,448*l.* 7*s.* for which the suit was brought.

3. A letter of attorney from *Anthony Bacon* to *Joseph Court*, of *London*, then bound on a voyage to *North America*, bearing date the 13th of *April*, 1775, authorising him to collect this debt.

4. The will of *Fielding Lewis*, dated the 19th of *October*, 1781, and codicil thereto annexed, dated the 10th of *December* following. To his wife, his six sons, and his daughter's husband, he gives a very considerable real and personal estate; declaring that the portion given to his wife was in lieu of dowry, and that the provision made for his son *John*, was "in consideration that he should pay 1,500*l.* sterling towards the payment of his debts." In the latter part of his will are the following clauses: "*Item*: It is my will that my share in the *Dismal Swamp* Company, my lands bought of *Marmaduke Naughflett*, in partnership with *General Washington*; my lands bought of *Dr. Wright* and *Jones*, in *Nansemond* County, in partnership with *General Washington* and *Dr. Thomas Walker*; and the three hundred and twenty acres of land in *Frederick* County, bought of *George Mercer's* estate, be all sold at the discretion of my executors; also my share in the *Chatham* rope-walk, at *Richmond*, which money so raised, to be disposed of, as I shall hereafter direct. *Item*: All monies arising from the sale of lands, loan-office certificates or otherwise, after my note to Mr. CHARLES CARTER and just debts are paid, I give to my six sons before mentioned, to be equally divided," &c. This will, with the codicil annexed, was exhibited for probate, to the Court of *Spotsylvania* County, on the 17th of *January*, 1782, and *John Lewis*, *George Lewis*, and *Fielding Lewis*, three of the executors therein named, qualified according to law.

At the hearing, in *May*, 1802, the Chancellor over-ruled the plea of the statute of limitations, filed by *John Lewis*, because it was proved by a witness that *John Lewis* himself, in the year 1789, acknowledged, that a considerable debt appeared by the testator's books to be due from him to the plaintiff's testator ; " which acknowledgment resuscitated, if otherwise the statute would have antiquated the " said debt—a debt arising from such accounts as concern the " trade of merchandise, between merchant and merchant." And the cause being further heard on the same day, the Court, considering the account, with its appendages, to be sufficient evidence both of the justice and amount of the plaintiff's demand, especially when the letter of *Fielding Lewis* was compared therewith, and the circumstance that the defendants had not produced the original account supposed to have been transmitted to their testator, decreed against *John Lewis*, the sole acting executor, to be paid out of the estate of his testator to be administered, the sum of 2,488*l.* 12*s.* lawful money of *Great Britain*, equal to 3,318*l.* 2*s.* 8*d.* current money of this Commonwealth, together with the costs, &c. The plaintiffs prosecuting no further, at present, against the other defendants, liberty was reserved to the plaintiffs to reinstate their demand against them.

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At a subsequent day of the same term, execution of the above decree was suspended as to 483*l.* 7*s.* and the cause retained on the docket for the future decision of the Court in relation thereto. From the above decree, *John Lewis* appealed to this Court.

*Wickham* and *Williams*, for the appellant, contended, that there was no evidence before the Chancellor, which would warrant a decree for any definite sum. From the letter of *Fielding Lewis*, and the acknowledgment of *John Lewis*, his executor, it might be inferred, that there was a considerable balance due ; but suppose the decree had been grounded on this evidence, it could only have been for a *considerable debt*.

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Besides, the acknowledgment of the executor could not be relied on to charge the estate of his testator.

The order directing the production of the books of *Fielding Lewis*, they contended, was wholly illegal. If the books had been the common property of the parties, the order might have been proper; but they were the private property of *Fielding Lewis*, contained his secrets, and no Court had the power to direct the production of them. The Court, indeed, might compel the executor to state what the books contained in relation to this particular subject. It was, however, unimportant in this case, because it appeared from the report of the commissioners that the books were burnt.

The cause having been set down for hearing on the plea of the statute of limitations, it must be taken to apply; as no special matter was replied to take the case out of the act. The circumstance relied on, of the acknowledgment of the executor, it has already been shewn, is inadmissible; and as to the fact stated, that the plaintiffs were *British* subjects, and out of this country, it cannot avail, unless it had been specially replied.

There was no legal proof of the justice of the account. The first and principal items were, "To *balance* of an account rendered and *agreed*." This *balance* and sum *agreed* must have been of an anterior date, and yet that has not been shewn. They must have been taken from *other* books, which are not produced. The Chancellor had mistaken the law in supposing this case to have been an exception in the act of limitations, on the ground of merchants' accounts; that applies only while there are running accounts, but ceases the moment the last item is entered.

According to the course of decisions in this country, this account would not be held to be sufficiently proved, even if there had been *depositions* taken in due form. But this was a mere *ex parte affidavit*, which was entitled to no weight in any Court.

It surely will not be contended, that the affidavit, in this case, is evidence, because the complainants are *British* subjects. The statute of 5 *Geo. II.* for the recovery of debts in *America*, may be binding on subjects of *Great Britain*, but not on citizens of the *United States*. At the first organization of the Federal Courts, it was solemnly decided, that the statute was not obligatory in this country; and the decision has been universally acquiesced in:

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*Botts*, for the appellee. There is no question between the parties but that something considerable is due; the only doubt is, as to the amount. The complainants state the amount in their bill, and call on the executors of *Fielding Lewis* to say whether it be correct or not. One defendant answers, and says, "that the executors of *Fielding Lewis* did not know that any thing was due to the testator of the "complainants." Of the knowledge of the other executors, he could not possibly be conusant. The deposition of *Simms* shews that the executor, who thus swears, had possession of the books and papers, and acknowledged that a considerable balance appeared to be due from his testator to *Bacon*. If he had answered the interrogatories in the bill, he must have stated the grounds on which he made the promise to settle that balance. A more evasive answer was never filed.

[Judge TUCKER. If the answer was considered evasive or defective, why did you not except?]

*Botts*. It would certainly have been most regular to except; but still the plaintiff may draw his inferences from the defects of the answer. In matters of account, too, it is not usual to insist on a very minute answer, where the cause may be regularly referred to a commissioner.

The apology of the executor, that the books of his testator had been burnt, ought not to protect him. He had once seen the account entered on those books; and when called on by the commissioners, he ought to have stated his best recollec-

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tion concerning it; instead of which, he roundly tells them that he cannot render any account.

The doctrine contended for on the other side, that the Chancellor had no right to order the production of the books, is in opposition to the settled practice in the Courts of *England* and of this country from the earliest period. These books were not merely private property. Both the creditors and legatees of *Fielding Lewis* had an interest in them. The executor is bound to pay the debts first, and then the legacies, consequently he is bound to disclose whatever he knows of the testator's affairs. Can it be presumed that the executor is allowed to keep such possession of the testator's books, as will enable him to commit a fraud on the

(a) 1 Hen. &  
Munf. 319.

creditors and legatees. In *Hook v. Ross*, (a) the principle is affirmed, that the defendant may be compelled to produce books which are not merely the private books of the party.

*John Lewis* would not produce these books, or give any information of their contents, on the presumption that they would operate against him. The maxim, then, emphatically applies, in *odium spoliatoris omnia præsumuntur*; (b) and the executor may be presumed against to its full extent. There are many cases on this point; none, perhaps, exactly alike; but some carry the doctrine much further. (c)

(b) Princip.  
Leg. & E-  
quit. 42.

(c) See 1 P.  
Wms. 730.  
732. *Dalston*  
v. *Coatsworth*.  
1 Vern. 207.  
*Childrens v.*  
*Saxby*. *Ibid.*  
308. *East-India*  
*Company*  
v. *Evans et*  
*al.* 1 Ch. Ca.  
292. *Gortside*  
*and others v.*  
*Radcliff and*  
*others*. *Hob.*  
109. *The King*  
*and Lord*  
*Hunsdon v.*  
*The Countess*  
*Dowager of*  
*Arundel et al.*

The letter exhibited in proof of the account, indicated circumstances sufficient to establish the demand; but, if it should not be thought enough to carry the whole claim, there can be no question but that the value of the 3,000 bushels of wheat should be allowed. It is conclusive that he thought himself indebted to that amount.

As to the statute of limitations which has been relied on, it was not pleaded in time, and was filed without leave of the Court. The Chancellor, on application, ought not to have permitted the plea to be filed, against the justice of the case; nor will a Court of Equity, under such circumstances, apply the statute by analogy. (d) But even if the plea had been regularly filed, it could not avail; because the promise of the executor, which was made within five years before the suit was commenced, to look at the books of his

(d) 3 Call,  
538. *Lomax*  
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testator and ascertain the balance, would take the case out of the statute.(e) This was, moreover, a foreign debt, as appears by the record ; and it behoved the defendant to shew that *Bacon* was in *Virginia*, so as for the statute to run against him. But a complete objection to the operation of the statute is, that the testator, by his will, directs his debts to be paid ; which has always been held to revive the debt in equity.

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(e) 2 Summ.  
64. a. *Hilli-*  
*ams's note to*  
*Hodden v.*  
*Harridge.*

*Monday, October 24, 1808.* The Judges delivered their opinions.

Judge TUCKER. The object of this suit is to obtain payment of an account alleged to be due from *Fielding Lewis*, deceased, to *Anthony Bacon*, of *London*, deceased. The bill charges that on the 31st of *December, 1773*, the balance of 2,338*l.* 6*s.* 5*d.* was due from the former to the latter, as by an account annexed, which is prayed to be taken as a part of the bill. That *Lewis* died in 1782, seised and possessed of a large estate in lands, slaves, &c. That he devised sundry tracts of land to be sold by his executors for payment of his debts, and charged the real estate devised to his son *John*, who is also an executor, with the payment of 1,500*l.* sterling towards payment of his debts. Alleges that the executors have failed to sell those lands, and have also neglected to make any inventory of the personal estate, or to render any account of their actings and doings as executors. Interrogates them whether that sum was not due, or what other sum was, or remains due ; and how the debt arose, and what each of them has *acknowledged* concerning the same, and the *time* of so doing. Prays a discovery of the assets, an account of the sales of the lands sold, and that if any remain unsold, that they may be sold ; and for a general account, and for general relief. *John Lewis*, who admits himself to be the only acting executor, answers, that the executors "DID" not know that any sum of money was due to *Bacon* from their testator ; an *equivocal* expression which certainly furnished good grounds for excepting to the answer, which, however, was not excepted to.

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Admits that his testator died, after making his will, possessed of a considerable real and personal estate, and particularizes sundry tracts, two of which they have sold for 1,350*l.* and the remainder are still on hand, as their supposed value could not be procured for them. That the amount of that sale, and the 1,500*l.* charged upon *John's* part of the estate, have been paid in discharge of debts due from their testator to sundry persons in *Virginia*. That he died possessed also of ninety-one negroes, and other personal property to the amount of ———, which were distributed agreeably to the testator's will. No regular account accompanies the answer, to which the plaintiffs replied generally. After which an amended answer was filed by leave of the Court, in which the executor, *John Lewis*, states, that since filing his former answer, he had discovered in an old pocket-book of his father, the following memorandum made with a pencil in his hand-writing. "Paid Mr. *Mercer* "for *Anthony Bacon*, 483*l.* Os. 7*d.* April 1st, 1776," to which he refers, as a part of his answer.

Both the justice and amount of the plaintiff's demand, is, in the opinion of the Chancellor, clearly and sufficiently proved by the affidavit of one *John Deane*, a book-keeper to *Anthony Bacon*, annexed to the account, and made before the Lord Mayor of London, April 13th, 1775. And a letter from *Fielding Lewis* to *Anthony Bacon*, dated January 24th, preceding.

The two principal items in this account are thus stated ;  
1769, December 31st. To balance of account

current as per account rendered and AGREED,

1,897*l.* 13*s.* 5*d.*

To ditto per slave account as per account

rendered and AGREED,

2,565*l.* 6*s.* 6*d.*

The letter from *Lewis* makes no mention of the amount of his debt, but certainly acknowledges one in terms which shew it to have been very considerable ; yet without affording any data by which any conjecture can be formed of the sum.

This affidavit, on which the Chancellor has founded his decree, was made near seventeen years before the com-

commencement of this suit, in another country, and without notice to the party sought to be charged thereby. Consequently, according to the decision in *Blincoe v. Berkeley*, (1 *Call*, 405.) it was wholly inadmissible ; there being no proof that *F. Lewis* ever acknowledged the justice of the account thereto annexed, or promised payment of *that* account, or that the same was ever seen either by himself, or either of his executors, previous to the commencement of this suit. *Fielding Lewis's* letter furnishes no such evidence, because it was written *before* this affidavit was made. Nor does *Charles Simms's* deposition mention that he shewed *that* account, or any other to the executor, *John Lewis*. The affidavit, and the account annexed, which must be taken as part of it, are wholly unsupported by any subsequent or collateral circumstance, or testimony, and therefore, ought to have been rejected as evidence, for the reasons before mentioned. But, further, there is intrinsic evidence in the account itself, to prove that *this* account was not the *best* evidence that could be had, inasmuch as those two items are charged as balances of *other* accounts *rendered* and *AGREED*. These accounts, so alleged to have been *agreed*, ought to have been produced, and the agreement thereto proved as alleged. Had this been done, the evidence arising out of *Fielding Lewis's* letter, would have had the effect, which the Chancellor erroneously imputes to it, of corroborating the plaintiff's demand. Whereas, being written several months before the affidavit was made, and in a different quarter of the globe, and containing no mention of any specific sum acknowledged to be due, it cannot be supposed to refer to any matter therein contained. The cause was not ripe for a final hearing and decree, upon this evidence ; *Fielding Lewis's* letter certainly affords sufficient grounds to believe that a very considerable debt was, at the time he wrote it, due from him to *Anthony Bacon* ; but furnishes not the least evidence by which the Court could ascertain the amount. At law, if an executor plead *plene administravit* in a suit founded upon an account, which is an admission of a debt ; or, if he even suffer judgment by default, or *nil dicit* to pass against him in such a case, yet

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(a) 1 *Esp. N.*  
*P.* 142. and  
*Bull. N. P.*  
140. cite 1  
*Salk.* 296.  
*Shelby's case.*  
*Quarles v.*  
*Littlepage*, in  
this Court,  
*May term*,  
1808, vol. 2. p.  
401.

must the plaintiff prove his account, or he shall recover only one penny damages.(a) I can discover no reason why Courts of Equity should be supposed so much more sharp-sighted than Courts of Law, as to be able, from *general* acknowledgments, to ascertain a determinate sum. Perhaps, indeed, it may be sufficient to establish a debt equal to the value of 3,000 bushels of wheat, but I am not altogether satisfied of that. In my opinion, the Chancellor, instead of proceeding to make a final decree upon this evidence, ought to have retained the cause for a year, to give the plaintiffs an opportunity of producing evidence, if they could, whereby the AMOUNT of the debt might be ascertained; and failing to do so, the bill should have been dismissed. That the account was not ascertained by a reference to *Lewis's* books, is imputable, in *part*, to the plaintiff's own neglect. The order for an account was made in *September*, 1795. The cause slept from that period till *March*, 1802, when other commissioners were appointed, who reported in *September* following, that they had called on *John Lewis*, the executor, for the purpose of settling his accounts of administration of the estate of his testator, when he informed them that it was *impossible* for him to make the settlement required, having on the 3d day of *April*, 1799, (near four years after the date of the first order,) lost all his books and papers, concerning that estate, as well as his own private books, by fire. No further steps appear to have been taken after this report.

But, even if this affidavit and account had been properly admitted as evidence in this cause, there are two manifest errors in the decree, which a bare inspection of the account will shew. The first is, that compound interest upon the balances stated as before mentioned, is not only charged in the account, but interest upon that compound interest, from the time of the institution of the suit, is given by the decree. The second is, that the decree is for 2,488/. 12s. the amount of the debit side of the account, instead of 2,448/. 7s. the amount of the balance apparent on the other side; which possibly may have been a mere clerical error in entering the decree; but is yet too important to pass unnoticed.

The decree not being final as to the 483*l.* 7*s.* alleged to have been paid to *Mercer*, for account of *Bacon*, no remarks are necessary, or would be proper upon that point.

We come now to consider a second, and that a very important point in this cause, as to the operation of the act of limitations.

*Fielding Lewis*, by his will, dated in *October*, 1781, appears to have bequeathed the whole of his slaves, stocks of horses, cattle and sheep, carriages, plate and household furniture, to his wife, his six sons, and his daughter's husband; as also a very considerable estate in lands, to those sons, and to his wife, the provision for whom is declared to be in lieu of her dowry. No mention is made of any provision for payment of debts, (except a charge of 1,500*l.* sterling upon the estate devised to his son, *John Lewis*,) until near the close of his will, we find the following clauses: "Item: It is my will that my share in the *Dismal Swamp Company*, my lands bought of *M. N.*" [and several other tracts particularly enumerated,] "be sold, at the discretion of my executors, which MONEY so raised, to be disposed of as I shall hereafter direct. Item: All MONIES arising from the sale of lands, loan-office certificates, or OTHERWISE, after my note to Mr. *Charles Carter*, and just debts are paid, I give to my six sons before mentioned, to be equally divided among them," &c. Under the term OTHERWISE, we may suppose he meant to include his outstanding debts, of which, in his letter to *Anthony Bacon*, he says there were not less than 5,000*l.* due at that time, and any other personal effects not specifically bequeathed to his wife and children. It appears, I think, to have been clearly his intention to exonerate his slaves, and other specific legacies, from the payment of his debts; by the substitution of the 1,500*l.* charged upon the estate devised to his son, and the lands, &c. mentioned or comprehended within the meaning of these clauses. The executor, *John Lewis*, seems to have understood the will in this manner, and in his answer states that the same have been distributed agreeably thereto. After filing his answer, to which the

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plaintiff replied generally, and an amended answer, to which there is no reply, and after the deposition of a witness had been taken, and the cause set for hearing by the plaintiff's counsel, that defendant filed a plea of the act of limitations, in bar of the plaintiff's demand. And at a subsequent term the cause was heard, as to that defendant only, upon the bill, *plea*, answer, exhibits, and the examination of a witness; when the Court reserving to the defendant the benefit of his plea, at the final hearing, directed the account already noticed: and upon the final hearing of the cause, overruled the plea; and proceeded to make a final decree in favour of the plaintiffs. I must here observe, that the plea neither appears to have been filed with leave of the Court, nor was it replied to by the plaintiffs, as it ought to have been, if they could shew, as possibly they might, that they came within any of the exceptions in the statute of limitations. (a) The Chancellor, upon what grounds I cannot perceive, pronounced it to be a debt arising from such accounts as concerned the trade of merchandise between merchants. But there is no charge to that effect in the bill, nor any thing else in the record that shews it. Nor, that I recollect, was this point insisted on, or even mentioned in the argument here. Besides, if it were such an account originally, it had been long since settled and agreed; which takes it out of the exception. (b)

(a) 3 Call, 1.  
*Bogle and  
Scott v. Con-  
way's Exe-  
cutors.*  
(b) 3 Bac.  
Abr. 513. old  
ed. or 4 Bac.  
Abr. Grail. ed.  
477. tit. "Li-  
mitation of  
Actions," let-  
ter E. 1 Vent.  
89, 90. 2  
Saund. 124.  
*Webber v.*  
*Tivis*, cited 1  
*Eq. Ca.* 304.  
*Watson on*  
*Partn.* 207,  
208, 209.  
*Dublin. ed.*  
2 Ves. 400.  
*Welford v.*  
*Liddell.* See  
also 2 Samul.  
137. note (6)  
by *Williams.*

The objections to the plea insisted on here, were, first, that it was a foreign debt, and the plaintiffs foreigners. This, if true, ought, nevertheless, to have been specially replied, for the reasons already mentioned. Secondly, that *Fielding Lewis's* letter was an *assumpsit* within the times limited by our statute. This is not correct. Thirdly, that the executor, *John Lewis*, acknowledged the debt to *Charles Simms*, as agent for the plaintiffs, which took it out of the statute; and fourthly, that the debt, if barred by the statute, was nevertheless revived by that clause in the testator's will, which speaks of the payment of his just debts. The two last remain to be considered.

*Charles Simms* deposes "that in 1789, the claim was put into his hands for collection, soon after which, he called on the defendant, *John Lewis*, and informed him that he had the collection of the said debt, and in the course of conversation on that subject, the defendant acknowledged that there appeared from his father's books to be a considerable debt due from his father's estate to *Anthony Bacon*, and promised to call on the deponent in a day or two, in order to ascertain the balance, but failed to do so." That a very slight acknowledgment by the party himself who contracts a debt, will take it out of the statute of limitations, is admitted. But this Court, in the case of an executor, seems to have thought there was some distinction. In the case of *Henderson v. Foote's executors*,<sup>(a)</sup> the plaintiff gave in evidence, that *John Fitzhugh*, the defendant, frequently said that he understood there was a considerable debt, of between two and three hundred pounds, due from *Foote's* estate to the plaintiff; that he believed the debt to be just, and found the account in the house, and was willing to pay his part of it; that the legatees and sons of *Foote* were determined to take every advantage, &c. The President, in delivering the opinion of this Court, said, "We are of opinion that, in this case, the loose conversation of *Fitzhugh*, even if he had been executor, instead of being only the husband of the executrix, would not have operated, either as a new promise, or as an acknowledgment so as to revive the debt." That case appears to me infinitely stronger than the present, as to this particular point. And there seems to be good reason why such a slight acknowledgment as might revive a debt against a debtor himself, should not receive the same liberal construction against an executor or administrator, who may be well persuaded of the justice of the debt, barred by the act, and yet not have assets to pay it; or, not without making themselves chargeable with a *devastavit*. And it is not improbable that the first clause of the statute of frauds and perjuries, was intended to protect executors from being made

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(a) 3 Call,  
251.

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chargeable as for a *devastavit*, upon such slight grounds of a promise to pay the debt of their testator.

But, the last ground of exception to the plea, to wit, that if the debt were barred by the statute, it was nevertheless revived by those clauses of the testator's will, which relate to the payment of his debts, still remains to be considered.

It seems to be doctrine pretty well established in equity, that if a testator direct in his will that all his just debts shall be paid, and charge his lands with the payment, debts barred by the statute of limitations are thereby revived.(a) But in all these cases *lands* were clearly charged with the debts, which made the executors *trustees* as far as that fund went. In 3 *Peere Williams*, 89. the reporter makes a *quære*, "whether if a man were to devise his *personal* estate "in trust to pay his debts, would this, *as creating a trust*, "revive a debt barred by the statute; or would not such "devise be merely void, as saying no more than the law of "course says, viz. that a man's personal estate shall pay his "debts." My own opinion is, that it would not. For suppose he were to direct that simple contract debts, particularly noticed, should be paid before any bond, or debt of greater degree: could a Court of Equity change the course which the law has established, and order such debts to be first paid? The personal estate is the *legal* fund for payment of debts, and which, as against *creditors*, unless they please, the testator cannot exempt, although as against a devisee of his land he may, by appropriating his lands, if sufficient, for payment of his debts. Where a testator gives his personal estate to his executors, he does no more than the law does, and it is like giving lands to the heir, which is void.(b) Such a devise, therefore, would not create a trust, which is, emphatically speaking, a mere creature of a Court, which claims to direct a man's actions according to conscience; because, the law has clearly and fully prescribed the course which an executor is bound to

(1) 1 Salk.  
154. *Anony-  
mous*. (1) 2  
Vern. 141.  
*Gofton v. Mill*.  
1 Eq. Ca. 304.  
2 Eq. Ca. 579.  
2 P. Wms.  
373. *Blake-  
way v. Earl  
of Strafford*.  
3 Bro. Parl.  
Ca. 305. S. C.  
2 P. Wms. 84.  
89. *Jones v.*  
*Lord Straf-  
ford*. Ibid. 91.  
*Harris v. In-  
gledeu*. Ibid.  
558, 359. *King  
v. King and  
Ennis*. See  
also *Amb*. 231.  
*Oughterlong  
v. Earl Pow-  
is*, where  
*Lord Hard-  
wicke* avoided  
the question;  
but seems  
clearly to be  
of opinion a-  
gainst a *par-  
ticular* debt  
being revived  
by such a  
trust as to  
lands: and 3  
Atk. 107. *La-  
con v. Briggs*.  
(b) 3 P. Wms.  
425, 325. per  
Ld. Ch. *Tal-  
bot*, in *Hazle-  
wood v. Pope*.

(1) See a valuable note to this case in *Evans's* edition of *Salkeld*.

pursue : his conscience, therefore, is bound by the law, and not by the will of the testator in any matter which may be incompatible with the law. But a trustee is bound to pursue the directions of him by whom the trust is created. An executor, therefore, is only to be regarded as a trustee in regard to such funds, committed to his management, as do *not* come under the character and description of *legal assets*, or personal estate. Over these a Court of Equity may exert its controul. It is, however, very true that the doctrine upon this head, as laid down in *Andrews v. Brown et ux.*(a) is that if a debtor make his will and direct that all his debts shall be paid, or made any provision for the payment of his debts in general ; that would revive such debt, and bring it out of the statute, so that his executors would be liable to the payment of that debt, among the rest. But this seems only to be the reporter's own opinion ; for that point was not in any manner before the Court.

The testator in the present case having disposed of, probably, the *whole* of his visible *personal* estate, among his wife and children ; and the executor having, as he has confessed in his answer, distributed the same according to the directions of his will ; the testator having, moreover, substituted a considerable *real* fund in lieu of the personal, for payment of his just debts ; a creditor having a demand against his estate, had it in his choice to pursue either of three modes, to obtain payment of his demand. *First*, against the executors, at law, who could not discharge themselves from their liability, by shewing that they had distributed the slaves, and personal estate, according to the directions of the testator's will ; but on the other hand, they were at full liberty, I conceive, to avail themselves of the lapse of time, by pleading the statute of limitations,

*Secondly*. They might in equity pursue the *personal* estate in the hands of the legatees ;(b) in which case, they also might have availed themselves of the statute ; or,

*Thirdly*. They might have brought a suit in equity, as the plaintiffs have done, against the executors, as *trustees*, in respect to the *lands* directed to be sold for payment of

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(a) *Preced. in*  
*Ch. 385.*

(b) *1 Wash.*  
*312. Burnley*  
*v. Lambert.*

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gatee.(a) 1 Eq. Ca.  
303, 304. 2 P.  
Wms. 145.  
Norton v.  
Turwill. Ibid.  
373. Blake-  
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debts ; in which case, according to the established doctrines of Courts of Equity, that trusts are not within the statute of limitations, (a) it appears to me the defendant is precluded from the benefit of his plea, so far as relates to his charge of 1,500*l.* sterling, upon the lands devised to *John Lewis*, and as relates to the other lands directed to be sold for the payment of the *testator's* debts ; but that the *personal* estate, not being properly the subject of a *trust* for the purpose, the plea is good as to that.

The testator so far from creating, or intending to create a *trust* in respect to this part of his estate, having disposed of it to his family, and substituted another fund in its stead.

For these reasons I am of opinion that the Chancellor's decree ought to be reversed, and the cause to be sent back with directions to be there proceeded in according to the principles which I have already expressed.

Judge ROANE. The appellees in this case, having set down the cause for hearing, without excepting to the answer, which is evasive, and does not come up to the requisitions of the bill, will perhaps suffer by their injudicious course of proceeding : for I have no doubt but that a much larger debt was due from the testator of the appellant than the appellees have established by their testimony. This is entirely manifest from the whole tenor of the letter of *January* 24th, 1775 : but, inasmuch as that letter does not ascertain the *ulterior* sum due to the appellees' testator, and as there is no other competent evidence to fix it, we must be content with decreeing the value of the three thousand bushels of wheat, spoken of in that letter, with legal interest ; and as the parties have consented that the execution of the decree appealed from, should be suspended until the further order of the Court, as to the sum of 483*l.* 0*s.* 7*d.*, with interest from the 1st of *April*, 1776, so as to let in the inquiry whether that sum (mentioned in the amended answer) was paid, or not, on account of the debt in question, I am of opinion that that inquiry should also be made, and, if found in the affirmative, that a deduction should be

made thereof from the sum decreed : both inquiries to be made by an issue to be directed by the Court of Chancery.

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As to the point of the act of limitations, it is unnecessary to inquire into the effect of the confession or acknowledgment of *J. Lewis*, proved by *Simms's* deposition. That point, as it relates to an acknowledgment by an EXECUTOR, is important, and will require due consideration. It is *unnecessary* to be decided, because I am clearly of opinion that the testator himself has waived the benefit of the statute of limitations, by creating a fund by his will, (from the sale of lands,) for the payment of his "*just debts*." The doctrine on this subject, after some controversy in the Courts of Equity, seems at length to be fully settled; and goes on this ground, that a debt barred by the statute of limitations is, nevertheless, a *debt*, though the act takes away the remedy for the recovery of it.<sup>(a)</sup>

(a) 5 Burr.  
2630. Corp.  
548. per Ld.  
Mansfield in  
Trueman v.  
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It has been established, (and, if it has not, it ought to be,) that an advertisement, by a debtor, notifying all those who have any just debts owing to them that they may apply at such a place and get payment, is such an acknowledgment as will bring a debt out of the statute. That case is analogous to the present, in which the testator manifests his desire that his just debts should be paid, and provides a fund for the purpose : a debt which is originally a *just debt*, does not cease to be so, in consequence of the lapse of five years since its creation.

It is supposed by the Judge who preceded me, that a debt *revoked*, by creating a trust-fund from real property, for its payment should be *confined* to that fund. I have found no case to warrant this restriction, and can see no ground on which it can be justified; at least where the created fund is additional to, and not in exclusion of the personal estate, which is the proper and natural fund for the payment of debts, and is never construed to be exonerated, but by *express* words, or a plain and necessary implication.

Where the real fund is *substituted* for the personal, and in lieu thereof, it might be *argued*, that there is not an ab-



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solute and unqualified waiver of the statute, but only a *conditional* one ; and that, therefore, a party claiming the benefit of the waiver, can only claim it on the terms imposed by the testator ; viz. by abiding by the exemption of the personal estate. In the case, however, of an *additional* fund, the waiver is without condition, and, the bar interposed by the statute being at an end, the creditor is restored to his original situation, and may seek payment as formerly, out of the personal estate.

The above *distinction* would seem to be reasonable ; but I have met with no cases which have taken it, and I give no decided opinion, respecting it. I think it clear, however, that in the case of an *additional* fund, the creditor is not ousted of his recourse against the personal estate.

The question then recurs, is the fund from the real estate in this case, additional to, or in exemption of the fund of the personal estate ? I infer the former. There is no express declaration that the personal estate is to be exempted ; nor is there a strong and necessary implication to that effect ; in which case, of a necessary implication, it is held that the personal estate should be specifically bequeathed to

(a) *Ambler's*  
*Rep.* 37. *In-*  
*chiquin v.*  
*O'Brien.*

others. (a) It is true it appears that negroes and other personal estate, are bequeathed by the testator ; but it does not appear that *all* the personal estate is bequeathed, either by particular legacies, or a general and sweeping bequest of the residue. What, then, is this but the ordinary case ; for in most wills, the personal estate, or a great part thereof, is particularly bequeathed away ; and yet that circumstance alone, does not operate an exemption from the payment of debts : the legacy is taken subject to the payment thereof. In this case, on the other hand, so far from there being an express or necessary exemption of the personal estate, a part thereof, viz. " monies arising from the sale of loan-office certificates, or otherwise," is expressly recognised and relied on for the payment of the debts. This case, therefore, is too naked for us to infer an exemption of the personal fund, a fund which, between a debtor and his creditors, is not lightly to be withdrawn from the payment

of the debts. I am, therefore, of opinion that the will in question amounts to an acknowledgment of the debt in controversy, and to a waiver of the statute of limitations: the consequence of which revival is, that the appellee's testator can charge the personal estate by the general law on this subject, and also charge the trust-fund, created by the will, by virtue of the provisions thereof.

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The decree, however, is only against the goods, or personal assets of the testator: it ought further to have provided a recourse against the real assets, in the event of the personal assets proving deficient. It is true, the decree is not appealed from by the *appellees*; but that probably arose, both from their confidence in the sufficiency of the personal fund, and from the consideration that their adversary had appealed. The Court, however, ought to give a decree commensurate with the rights of the parties, and a correction, as to this point, ought now to take place. As to the objection that the personal estate has been *distributed*, there is nothing in it. The appellant had reason to know, and did know, from the books of his testator, that this debt was due; and he ought not to have distributed the estate before that debt was satisfied: besides, we are not told *when* the estate *was* distributed: and, although it was distributed, yet, until the whole amount is *applied*, the executor is considered as having *assets*, for the due production of which, when necessary, he has taken bond from the distributees.

Upon the whole, I am of opinion, that the decree should be reversed, and one rendered in lieu thereof, somewhat to the following purport: "This Court is of opinion that the decree of the High Court of Chancery is erroneous, in this, that there is no adequate testimony in the cause warranting the same to the extent for which it is rendered; and also in this, that it does not provide a recourse for the appellees, against the *real assets* set apart by the will of the testator, *F. Lewis*, for the payment of his debts, in the event of the personal assets proving insufficient for the payment of the debt in controversy: and this Court proceeding, &c. is of opinion, and doth ac-

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“ cordingly decree, that an issue be made up and tried, under  
 “ the direction of the Court of Chancery, to ascertain the  
 “ value, at *Fredericksburg*, in this State, of 3,000 bushels of  
 “ merchantable wheat when manufactured into flour, as of  
 “ the date of the 24th of *January*, 1775, which sum, with  
 “ legal interest from the said day until the 27th of *May*,  
 “ 1803, ought to be decreed to the appellants ; and that the  
 “ same be also charged upon the real assets created by the  
 “ will of the said *Fielding Lewis*, in the event of the per-  
 “ sonal assets proving insufficient, in such manner, and  
 “ under such conditions and restrictions, as the said Court  
 “ of Chancery shall prescribe and direct : Provided never-  
 “ theless, that if the appellant shall make application there-  
 “ for, within a reasonable time, to be limited by the said  
 “ Court, an issue shall be also directed to ascertain whether  
 “ any and what payments have been made on account of the  
 “ debt aforesaid, since the date aforesaid, and at what time  
 “ or times respectively ; and, if any such be found to have  
 “ been made, that the several and respective amounts there-  
 “ of, with legal interest thereupon from the respective  
 “ times when made, until the said 27th of *May*, 1803, be  
 “ deducted from the sum hereby directed to be decreed :  
 “ and provided also, that there shall be deducted, in both  
 “ instances, (that is, both with respect to the sum hereby  
 “ directed to be decreed, and in respect of the payments  
 “ which may be found to have been made, on account there-  
 “ of, as aforesaid,) such and so much of the interest there-  
 “ upon, as may have accrued between the 19th of *April*,  
 “ 1775, and the 19th of *April*, 1783 ; that, in the event of  
 “ such issue being required, within the time to be prescrib-  
 “ ed, as aforesaid, the decree before directed to be render-  
 “ ed be suspended, until the result thereof ; and at the next  
 “ ensuing term of the Court of Chancery, or as soon as  
 “ may be thereafter, be permitted to take effect for the  
 “ whole, or a part of the sum hereby directed to be de-  
 “ creed, as the case may be : and, in the event of the whole  
 “ of the said sum, with interest as aforesaid, being found

"to have been paid, that then, and in that case, the bill of  
"the appellees to stand dismissed with costs."

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Judge FLEMING. After a careful examination of the record in this cause, there appeared to me only one difficulty of importance, and that is, whether, and how far, the act of limitations, pleaded by the defendant, is properly a bar to the plaintiffs' demand, taking into consideration the trust created by the will of the testator, *Fielding Lewis*, for payment of his debts.

In examining the cases (as far as I have had access to books) where a trust created by will, for payment of debts, lets in such as are otherwise barred by the statute of limitations, there seems to have been some contrariety of opinions on the subject; but the result, upon the whole, appears to be, (and so it was said by Lord *Hardwicke*, in the case of *Lacon v. Briggs*, 3 *Atkins*, 107.) that "*there must be a direct admission of the debt, to take it out of the statute of limitations, though there have been several cases at law, where this has not been held sufficient, unless it is likewise attended with an express promise to pay;*" but that (said his Lordship) may be rather too hard: and it has been truly said, that where *real estate* has been affected by such stale debts, it is in a plain and clear case, and not to be charged with a debt that must depend upon an account to be taken. "I am of opinion," said Lord *Hardwicke*, "*that if I should decree an account to be taken in this case,*" the account being of 17 years standing, "*I should make one of the worst precedents that a Court of Equity can make, for disturbing the peace of families.*"

There is, however, in the case before us, an acknowledgment under the hand of the testator, *Fielding Lewis*, in a letter to *Anthony Bacon*, (already noticed,) that he was manufacturing 3,000 bushels of wheat, the proceeds of which he promised to remit towards discharging his debts; and so far, the account between them seems to have been established; and to that amount, the trust, created by the will, lets

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in the debt otherwise barred by the act of limitations : but, in my conception, the plaintiffs must resort to the fund created by that trust for payment, as it is upon that ground, and upon that only, that they can be let in for any part of the debt. And I would still leave a door open to the plaintiffs to establish a further demand against the estate, by any legal or equitable means they may think fit to pursue, so far as there may yet remain unappropriated, any fund arising out of the said trust estate, but no further.

Judge FLEMING presented the following decree as the result of the opinions of the Judges.

*This Court* is of opinion that the decree is erroneous in this, that the Chancellor admitted an account stated, and an affidavit annexed thereto, to be evidence in this cause to charge the deceased *Fielding Lewis's* estate, with the amount of that account, although that affidavit was made in a foreign country, without the knowledge of the party, sought to be charged thereby nearly *seventeen* years before the commencement of the appellees' suit ; and, although there is no proof that the said *Fielding Lewis* ever acknowledged the justice of that account, or promised payment thereof, or that the same was ever seen either by himself, or by his executors, or either of them, previous to the institution of the present suit, and although the two principal items therein, amounting respectively to the sum of 1,897*l.* 13*s.* 5*d.* and 2,565*l.* 6*s.* 6*d.* are severally stated as balances of other accounts, rendered and *agreed* ; which accounts, so alleged to have been agreed, ought to have been produced, if still in existence, and proved as alleged ; as also in this, that compound interest is charged in the account so stated and exhibited, and interest is also allowed by the decree upon that compound interest, from the time of the institution of the appellees' suit ; as also in this, that the decree pronounced is for the aggregate amount of the account so stated, to wit, 2,488*l.* 12*s.* instead of 2,448*l.* 7*s.* the balance stated to be due, even if that account had been proper evidence in this

cause ; therefore the said decree is reversed with costs : and this Court proceeding to make such order and decree as the said Superior Court of Chancery ought to have made, is of opinion, that the letter of the said *Fielding Lewis* to *Anthony Bacon*, dated the 24th day of *January*, 1775, acknowledging a debt due from him to the said *Anthony Bacon* in such terms, as shew it to have been very considerable, but without specifying the amount thereof, of which there is no evidence, affords sufficient reasons for retaining the cause in the said Superior Court of Chancery, for a year, or such further time as the said Superior Court of Chancery may think reasonable ; to be further proceeded in, in such manner as the parties may be advised, for their benefit ; and, on such further proceedings to be had in the cause, a majority of the Court is of opinion, that the estate of the said *Fielding Lewis* is to be charged with the value of three thousand bushels of wheat, which, in the said recited letter, he said he was manufacturing into flour, and promised to apply the proceeds thereof towards discharging the said debt, the value, or proceeds of which, to be ascertained in such manner as the said Superior Court of Chancery shall direct ; and further, to inquire whether the same, or any, and what part thereof, hath been by the said *Fielding Lewis* so applied. And a majority of this Court is further of opinion, that the benefit of the appellant's plea of the act of limitations was, and is, proper to be reserved to him until the final hearing of this cause ; and if, upon that occasion, it shall appear that there remains any surplus of the funds appropriated by the testator, *Fielding Lewis*, specially to the payment of his just debts, the said plea ought not to operate or be admitted by the said Court of Chancery to bar the appellees from a decree, for so much thereof as shall appear to remain in the hands of the appellant, after payment of other just debts of his testator : but as the appellees have not shewn themselves to be within any of the exceptions contained in the act of limitations, the appellant will be entitled to the benefit of the said act, in bar of a recovery against him, beyond the balance which may so appear, upon an account to be taken as to those funds, in such manner as

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the said Superior Court of Chancery shall direct. It is therefore decreed and ordered, that the cause be remanded to the said Superior Court of Chancery, for further proceedings to be had therein, agreeable to the foregoing opinion.

*Monday, October 24, 1808.* The following decree, in substance, was entered.

The *whole Court* was of opinion, that the decree of the Chancellor was erroneous, in this, that he admitted an account stated, and an affidavit annexed thereto, to be evidence in the cause, to charge the estate of *Fielding Lewis*, deceased, with the amount of that account, although that affidavit was made in a foreign country, without the knowledge of the party sought to be charged thereby, nearly seventeen years before the commencement of the appellees' suit; and although there is no proof that the said *Fielding Lewis* ever acknowledged the justice of that account, or promised payment thereof, or that the same was ever seen either by himself, or by his executors, or either of them, previous to the institution of the present suit; and although the two principal items therein, amounting respectively to the sum of 1,897*l.* 13*s.* 5*d.* and 2,565*l.* 6*s.* 6*d.* are severally stated, as *balances* of other accounts *rendered* and *agreed*, which accounts so alleged to have been agreed, ought to have been produced, if still in existence, and proved as alleged. As also in this, that compound interest is charged in the account so stated and exhibited; and interest is allowed by the decree upon that compound interest, from the time of the institution of the appellees' suit: as also in this, that the decree pronounced is for the aggregate amount of the account so stated, viz. 2,488*l.* 12*s.* instead of 2,448*l.* 7*s.* the balance stated to be due, even if that account had been proper evidence in the cause.

Decree reversed, with costs, &c. And the Court proceeding to pronounce such decree as the Superior Court of Chancery ought to have pronounced, the *whole Court* was

of opinion, that the letter of *Fielding Lewis* to *Anthony Bacon*, dated the 24th of *January*, 1775, acknowledging a debt due from him to the said *Bacon*, in such terms as shew it to have been very considerable, but without specifying the amount thereof, of which there is no evidence, affords sufficient reason for retaining the cause in the Superior Court of Chancery for a year, or such further time as the said Court of Chancery may think reasonable, to be further proceeded in, in such manner as the parties may be advised for their benefit : and in such further proceedings to be had in the cause, a *majority of the Court* is of opinion, that the estate of the said *Fielding Lewis* is to be charged with the value of 3,000 bushels of wheat, which, in the said recited letter, he said he was manufacturing into flour, and promised to apply the proceeds thereof towards discharging the said debt ; the value or proceeds of which to be ascertained in such manner as the said Court of Chancery shall direct ; and further, that the said Court of Chancery direct an inquiry to be made, whether the same, or any, and what part thereof hath, by the said *Lewis*, been so applied. And a *majority of the Court* is further of opinion, that the benefit of the appellant's plea of the act of limitations was, and is proper to be reserved to him, till the final hearing ; and if, upon that occasion, it shall appear that there remains any surplus of the *funds appropriated by the testator, FIELDING LEWIS, specially to the payment of his just debts*, the said plea ought not to operate, or be admitted by the said Court of Chancery, to bar the appellees from a decree for so much thereof, as shall remain in the hands of the appellant, after payment of other just debts of his testator : but as the appellees have not shewn themselves to be within any of the exceptions contained in the act of limitations, the appellant will be entitled to the benefit of the said act, in bar of a recovery against him, beyond the balance which may so appear upon an account to be taken as to those funds, in such manner as the said Superior Court of Chancery shall

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direct. The cause was remanded to the Superior Court of Chancery, for further proceedings, agreeable to the foregoing opinion and decree.

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Robert and Samuel Terrell against Page's  
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It is a good ground for arresting judgment and awarding a *re-pleader* after a general verdict for the plaintiff, that there were two counts in the declaration; the one, beginning in *covenant*, and concluding in *case*; and, the other, *entirely in case*. To which, the defendant pleaded only, "that he had not broken the covenants."

(a) See 2  
Stra. 814.  
Moore v.  
Jones. 2 Lord  
Raym. 1536.  
S. C.

THIS was an appeal from a judgment of the District Court of *Fredericksburg*.

*Robert and Samuel Terrell* brought an action of *covenant* upon a written agreement, but not under seal, (a) between *Mann Page*, of the one part, and *Robert and Samuel Terrell*, of the other, (as mentioned in the deed,) but signed only by *Mann Page* and *Samuel Terrell*, whereby "*Page* did bind himself to let and grant unto the said *R. and S. T.* a lease of his mill, to have and to hold the same from one to three years, as they may chuse;" "and further did bind himself to keep the said mill in good order during the above mentioned LEASE." And the plaintiffs say that, under the agreement aforesaid, they were possessed of the said mill for one year, and fully complied with every part of the aforesaid agreement, but that the defendant did not comply therewith on his part, for that the dam was broke by a violent flood of rain, and the defendant, although requested to repair it, had refused so to do, and the plaintiffs were obliged to do it, at the expense of 45*l*. whereby he became liable to pay the same to them, and assumed to pay the same, when thereto required. Then there follows a count for money laid out and expended to the defendant's use, which he assumed to pay. Nevertheless, not regarding his promises and undertakings so made as aforesaid, he had refused to pay the plaintiffs, &c. The defendant, after taking oyer of the agreement, pleads, "that he hath not broken

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"his covenant in manner and form as the plaintiff hath complained, and thereupon issue is joined." The Jury found a verdict for the plaintiffs in these words: "We, of the Jury, find for the plaintiffs, in damages, 60*l.* 6*s.* 10*d.*" The County Court gave judgment for the damages so assessed; but on an appeal, taken by *Page*, to the District Court of *Fredericksburg*, the judgment was reversed, and the cause remanded to the County Court, for an issue to be made up, and tried between the parties on the second count; the judgment, on the first count being, in the opinion of the Court, erroneous, and there being no issue joined on the second count. From this judgment, the *Terrells* appealed to this Court.

*Williams*, for the appellant. The first count in the declaration, though it begins in *covenant*, is essentially in *assumpsit*. It charges that the plaintiffs paid so much money for the repairs of a mill, which, by the terms of the contract, the defendant was bound to repair, and which he failed to do. In consideration of which, the defendant assumed to repay the amount. The second count is also *indebitatus assumpsit*.

The plea is substantially to the action; and, according to all the authorities, if there be an issue, although it be not an apt one, it is aided by verdict; as *not guilty*, in an action of *assumpsit*.(a)

So, in *assumpsit*, upon several promises, the defendant pleaded, "that he had performed all things on his part to be performed," and it was held to amount to the general issue.(b)

It is a rule in pleading, that when the defendant pleads a bad plea, which is found against him, the plaintiff may

(b) 2 Lord Raym. 968. Taylor v. Sea. 1 Salk. 394. 8. C. under the name of Sea v. Taylor.

(a) Cro. Eliz. 470. Corbyn v. Brown. Cro. Jac. 576. Jouce v. Parker, &c. Lev. 142. Ehrington v. Doshant. 1 Stra. 574. Robinson v. Green. 2 Stra. 1032. Marsham v. Gibbs. 1 Hen. & Munf. 153. Hunnicutt and others v. Cusaley.

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(a) 1 *Bac.*  
*Abr. Gwil.*  
edit. 184. in  
notes, let. (E.)  
4. cites 1 *Sid.*  
289. *Wal-*  
*tingham v.*  
*Combe.* 1  
*Lev.* 183. S.C.  
(1)

have judgment, either for the insufficiency or falsity of the plea.(a)

If the above positions be correct, then the judgment of the County Court, though not formal, is substantially right: 1. Because the plea professes, and is in fact an answer to the whole declaration. 2. Because the issue was merely an informal one, and, having been found for the plaintiff, he shall have judgment.

But, even if the first count be faulty, yet the second is clearly good; and the Jury having found for the plaintiff, on the whole question submitted to them, on the merits, the judgment of the County Court ought to be sustained.

*Botts*, for the appellee. The first count in the declaration is incurably bad. It is in covenant upon a simple contract. The writing on which the defendant was charged, is merely recited in *hac verba*, a mode of pleading condemned by this Court in *Cooke v. Sims*.(b) The paper is not averred to have been signed or delivered by *Page*; and, it would seem, on its face, never to have been perfected; for it is only signed by two out of three contracting parties. The breach is not one fitted to the agreement to execute a lease, but it would do for a breach to an ordinary covenant in a lease. The paper in the record imports no lease in itself. It could not create a tenancy. It was a mere project of an agreement to execute a lease. Even the commence-

(b) 2 *Call*, 39.  
and *Hord v.*  
*Dishman*, 2  
*Hen. & Munf.*  
395.

(1) *Quere*, whether the authorities cited by *Bacon*, support the general position advanced in the text. The case of *Walsingham v. Combe*, (1 *Sid.* 289. and 1 *Lev.* 183.) merely proves that an informal issue is cured by verdict, but not an immaterial one; and the distinction between these issues is well explained in 1 *Lev.* 32. *Serjeant v. Fairfax*. The other cases cited by *Bacon*, as establishing the same point, viz. *Moor*, 399. *Hide v. Dean* and *Canon of Windsor*. *Cro. Eliz.* 457. S. C. and 2 *Leon.* 116. *Gray and Constable's* case, seem as little applicable. It is to be regretted that a book in such general use as *Bacon's Abridgment*, and one deservedly held in such high estimation by the profession, should abound in so many errors, both as to reference and doctrine. Some future editor, we may hope, will see the propriety of examining all the references, and not content himself with merely copying the errors of his predecessor.

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ment of the tenancy, and the election of the plaintiffs to take the tenement for one or three years, was left to be fixed by the lease. To suppose that the tenancy was created without the lease, would be to do violence to the plain words of the writing, and to do injustice between the parties. The cases in ejectments where the distinction has been taken between an agreement to lease, and a writing containing words of present demise, are decisive on the law of this point. The injustice would consist in surprising the landlord with a premature tenancy, in which only one of two joint-tenants would be bound in the agreements on their parts to be performed. The declaration avers that, under the agreement, the plaintiffs were possessed for one year. If the agreement was merely *inchoate*, and there were in it no words of *present* demise, the plaintiffs could not be possessed under it. The declaration does not aver that the injury to the dam happened within the year of the plaintiff's possession. This is a defect in the plaintiff's case, and not in the mode of setting it out. The injury to the dam was not provided for by the agreement. The Court might be wearied with further objections to the first count, but enough have been enumerated.

Proving the first count to be bad would sustain the verdict on the second, if there was any issue on it.

The defendant craved *oyer* of the covenants, and pleaded he had not broken his covenants. It is only by a perversion of all sense and language, that this can be turned into *non-assumpsit*. It is to contend that a plea of any thing is a plea to every thing.

There are cases in which *not guilty* in *debt* or *assumpsit*, is cured by verdict; but in these the parties appeared to have gone to trial on the merits, and there were no counts to which *not guilty* could be *intended* to apply, except the counts in *debt* or *assumpsit*. By necessary intendment, therefore, to support the justice of the case, and to avoid the total uselessness of the plea, the Court will apply it to the declaration. But if *not guilty* were pleaded in a suit where *assumpsit* and *tort* were joined, the plea would have

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its natural and useful effect by being confined to the *tort*; and, in such case, the Court would not apply it to both counts.

In the case at bar, the plea is not, *in short*, "*not guilty*," but it is, that the defendant had not broken the covenants. It is obvious that this was intended for the first count alone, and that the verdict was upon the issue formed on it. The plea to the covenant was to be imputed to the plaintiff, whose complaint was in covenant. It would be as unjust, as it would be absurd, to make, by legal legerdemain, an issue that never entered into the minds of the parties, nor was heard of by the Jury.

Wednesday, October 26. The Judges gave their opinions.

Judge TUCKER, having stated the case as above, proceeded.

Here are two counts in this declaration; the one begins in covenant, and concludes in case; the second is altogether in case. There is but one plea, and that is to the count which begins in covenant, leaving the other count unanswered.

Upon a view of this agreement, it appears not to be a lease in itself, nor even a demise, but an agreement to make a lease with certain covenants and conditions therein. (a)

(a) See 2  
Call, 34. the  
opinion of  
Judge Lyons.

The only breach capable of being assigned upon this agreement, (to which Samuel Terrell only, and not Robert and Sa-

(b) See Esp.  
N. P. 246.  
3d edit.

muel, (b) is a party,) would be, that the defendant refused to make a lease pursuant thereto; and as Robert Terrell, though named; is not, in fact, a party to this agreement, no action can be sustained by him upon it. I am, therefore, of opinion, that judgment ought to be arrested upon the first count; and that upon the second count, there being no *non pros* entered by the plaintiff, the cause ought to be sent back for further proceedings to be had upon that count, agreea-

(c) 2 Call, 39. bly to the decision in *Cooke v. Simms*. (c)

Judge ROANE was of opinion, that the judgment of the District Court was perfectly correct, and ought to be affirmed.

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Judge FLEMING concurred.

By the whole Court, (absent Judge Lyons,) the judgment of the District Court affirmed, and the cause remanded for further proceedings.

Spotswood against Price, Executor of Claiborne, &c.

Tuesday,  
October 25.

THIS was an appeal from a judgment of the District Court of *Fredericksburg*, affirming, with damages and costs, a judgment of the County Court of *Spotsylvania*, recovered by the appellee against the appellant.

If an Executor obtain a judgment, for a debt due to his testator, against the administrator of the debtor, to be levied of the goods and chattels of the intestate, &c. and, afterwards, bring an action of debt against the administrator, suggesting a *devastavit*, and declare in the *detinet* only, he cannot have judgment of *bonis propriis* of the administrator, but only of *bonis testatoris*.

*Robert Price*, styling himself Executor of *Philip Claiborne*, who was assignee of *William Dandridge*, Executor of *William Armistead*, deceased, instituted an action of debt, suggesting a *devastavit*, in the County Court of *Spotsylvania*, against *Alexander Spotswood*. The declaration was in the *detinet* ONLY, for 118*l.* 0*s.* 4*d.* and 5 dollars and 12 cents; and charged that the plaintiff, theretofore, in the said Court, recovered a judgment against the said *Alexander Spotswood*, as administrator of *William Daingerfield*, deceased, for the above sum, being the debt and costs, to be levied of the goods and chattels of the said *Daingerfield*, if so much, &c. and concludes with an averment, that after the rendition of the said judgment, the defendant, (*Spotswood*, now appellant,) elained, wasted, and disposed of, to his own use, the goods and chattels of his intestate, to the value of the debt and costs thereby claimed. The damages were laid at 100*l.*

To entitle the plaintiff to a judgment of *bonis propriis*, in such case, he ought to declare in the *debet* and *detinet*.

clare in the *debet* and *detinet*.

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The defendant (*Spotswood*, now appellant) pleaded, that he had "fully administered all and singular the goods and chattels, rights and credits of the said *William Daingerfield*, deceased, which had come to his hands to be administered;" and concludes with a verification. To this plea there was a general demurrer and joinder. The County Court, on argument of the demurrer, gave judgment, that the plea of the defendant, and matters therein contained, were not sufficient in law to bar the plaintiff's action. Judgment was thereupon rendered for the debt in the declaration mentioned, and a writ of inquiry awarded to ascertain the damages. The Jury assessed them at 118*l.* 0*s.* 4*d.* and 5 dollars 12 cents, the sum claimed in the declaration. For this sum and costs, judgment was entered against *Spotswood*, who appealed to the District Court; and the judgment of the County Court having been there affirmed, he again appealed to this Court.

*Williams*, for the appellant. The first proposition for which I shall contend, is, that the declaration should have been in the *debet* and *detinet*, and not in the *detinet* ONLY.

(a) 3 East, 2.  
*Hope v. Bague*  
& *Thompson*.

Upon looking into the authorities, one will be found, (a) where the plaintiff declared in the *detinet* only, and the judgment was sustained: but that was after *verdict*, this is after *demurrer*; and the Court will go back to the first fault in the pleadings, which is in the declaration.

The most that the plaintiff could recover, under such a declaration as this, would be a judgment *de bonis testatoris*; but this being a judgment *de bonis propriis*, it is error.

The demurrer to the plea, in the County Court, admitted, that the defendant had fully administered, and therefore judgment ought to have been rendered in his favour. The plaintiff, instead of demurring, should have replied the judgment, by way of *estoppel*; and not having done so, he cannot, upon a general demurrer, use it as such.

Another error was, that the damages laid in the declaration, were 100*l.* only, and the verdict and judgment were

for 118*l.* 0*s.* 4*d.* and the costs of the former judgment. The plaintiff can only recover in *damages*; and he cannot obtain a judgment for more than he has laid in his declaration.

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*Botts*, for the appellee. If the action had been brought by *Price*, in his own right, the declaration should have been in the *debet* and *detinet*. The recovery of the first judgment by him, as executor, did not make the sum recovered *due to him*, which his own first declaration, by being in the *detinet*, supposed to be owing to his testator. If the recovery on a declaration properly in the *detinet*, should be understood to change the *owing* from the testator to the plaintiff, the judgment would not accord with its own declaration. In a late case, greatly laboured, in the Federal Court, it was decided that the *administrator de bonis non*, was entitled to revive the judgment obtained by the first representative of the deceased. This, however, could not have been done, nor the law have been so established, if the debt was changed from the right of the testator to the executor, on the latter's obtaining his judgment.

If I am wrong in this, still the fault is cured. Suppose a general demurrer had been filed to this deed—then the act of Assembly(a) would have sustained it. The rule is, that upon a demurrer to the plea, you shall go back to the first fault; that is, the first fault that would be fatal on general demurrer; for by pleading, and not assigning specially, faults *in form*, under the reason of the statute, they are waived. To say that the defendant owes to the plaintiff, or to omit such allegation, has nothing to do with the “*very right of the case*.” Whether the defendant does owe to the plaintiff or not, is to be determined by the case made out in the declaration. If the case at bar shews that, according to law, the defendant owed to *Price*, it was unnecessary to state in terms that matter of legal inference. What single purpose could it answer? The books treat these, I know, as words of cabalistic import. Rules of practice are not like rules of property. The former should be moulded to attain justice. To omit the subscription of *John Doe*

(a) *Rev.*  
*Coke*, vol. 1.  
c. 76. s. 27. p.  
112.



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and *Richard Roe*, was once held fatal to a declaration upon demurrer.

The judgment was only inducement, and was therefore properly set out by way of recital. The *wasting* was the gist of the action.

The declaration charged a wasting of the assets generally. The plea is fatally incorrect in confining itself to the assets which accrued before the rendition of the judgment in the declaration mentioned. It only answered a part of the plaintiff's case, being an affirmative pregnant with a negative.

The declaration charged a waste of assets. *Devastavit vel non*, would have opposed a negative to an affirmative. *Fully administered* was answering an affirmative with an affirmative. A traverse was essentially necessary to make the plea issuable.

But the judgment was an *estoppel* to the defendant to deny assets to satisfy the judgment, or to affirm any fact incompatible with the receipt of sufficient assets. If the defendant had fully administered the assets, admitted by the judgment, in paying other debts, it was a *devastavit*. The declaration shewed the *estoppel*. A replication of it would only have been to shew it again. As to the damages, the defendant may get clear of them by paying the debt. The judgment is rendered for the debt to be discharged by the damages.

*Tuesday, November 1.* The President delivered the opinion of the Court: That the appellee, not having charged the appellant, in his declaration, in the *debet* and *detinet*, as he might, but in the *detinet* only, was not entitled to a judgment against him *de bonis propriis*, but *de bonis testatoris* only. Judgment reversed with costs, &c. and entered according to the principles of this opinion.

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**Moore's Administrator against Dawney and another,  
Administrators of Bell.**

THE appellees, in their character of administrators of *Thomas Bell*, deceased, brought an action of trespass in the District Court of *Fredericksburg*, against the appellant's testator, in his life-time, as late High Sheriff of *Orange County*; and declared, "for that *whereas*," *G. L. Grasty*, one of his deputies, under colour of an execution, in behalf of a certain *John Allen*, against the goods and chattels of a certain *Zachariah Burnley*, with force and arms, entered the plaintiff's close, and took and carried away therefrom, eight slaves, by name, belonging to the estate of their intestate; concluding, in the usual way, to their damage of 3,000*l*. Plea, *not guilty*.

The gist of the action must, in all cases, be directly and positively averred in the declaration: therefore, if, in trespass, the plaintiff declare, "for that *whereas*," &c. and do not make a positive averment, it is error, and will not be cured by verdict.

At the trial, a demurrer to the evidence was filed, from which it appeared, that *Thomas Bell*, the plaintiff's (now appellee's) intestate, in the month of *December*, 1795, intermarried with *Sally*, the daughter of *Zachariah Burnley*; that immediately after the marriage, *Burnley* sent the slaves in the declaration mentioned, to the said *Thomas Bell*, in whose possession they remained till his death, in *April*, 1795, a few days previous to which his wife died; that, after the death of *Thomas Bell*, viz. on the 23d of *May*, 1798, an execution was issued from the Clerk's office of the District Court of *Fredericksburg*, at the instance of *John Allen*, against *Zachariah Burnley*, upon a judgment of that Court rendered in *April*, 1795, and founded on a contract made in the year 1784; which execution was levied on the

An action of trespass lies against a High Sheriff for the tortious act of his deputy, as such.

If an administrator declare (in trespass) that the defendant with force and arms, entered his (the plaintiff's) close, and took therefrom, certain slaves belonging to the estate of his intestate, it will be intended, and that the plaintiff was in possession thereof, for the purpose of finishing the crop, by virtue of the act of Assembly. (*Rev. Code*. 1 vol. c. 92. s. 46. p. 166.)

A father possessed of an ample fortune having sent certain of his slaves, immediately after the marriage of one of his daughters, to her husband, in whose possession they remained, without interruption or claim, until his death, which happened two years and four months afterwards; it will be presumed, (no proof of fraud appearing,) that such slaves, being no more than a reasonable provision for the daughter at the time, were a gift in consideration of the marriage; and the right of the representatives of the husband is good against the creditors of the father.

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said slaves, then in the possession of the plaintiffs, (the appellees,) and who had been possessed of them from the death of the said *Thomas Bell*, their intestate, as a part of whose estate they had been appraised; that the sale was forbidden by the plaintiffs, of which the Sheriff took no notice, but sold the said slaves in discharge of the aforesaid execution; that, at the time of the marriage above stated, *Zachariah Burnley* was possessed of a large fortune; that he had been in the habit of giving each of his daughters, upon their marriage and going to house-keeping, seven slaves, and had frequently declared his intention of making a similar provision for the rest of his children, under like circumstances. Then follows, as a part of the evidence demurred to, a certificate of the Clerk of *Orange County*, of *William Moore's* being, at the time of the service of the said execution, High Sheriff of the said County, and of *Grasty's* having been duly qualified as one of his deputies. There is also in the record, a deed from *Zachariah Burnley* to his son *Reuben*, dated the 23d of *January*, 1796, for forty-nine slaves; (in which deed the consideration is expressed to be 2,225*l.*) together with the inventories and appraisements of the estates of *Zachariah Burnley*, (who died in *May*, 1800,) and of *Thomas Bell*.

The Jury found a verdict for the plaintiffs, for 432*l.* damages, subject to the opinion of the Court upon the demurrer to evidence.

On argument of the demurrer, the District Court gave judgment for the plaintiffs (the appellees) for the damages assessed by the jury, together with the costs. From this judgment *Moore* took an appeal, pending which he died; and it was revived, by consent, against his administrator.

*Warden*, for the appellant, relied on the following points:

1. That an action of trespass would not lie against the High Sheriff, for the act of his deputy. The officer who takes the property is alone liable. Trespass is an immediate injury, and the persons who commits it, is answerable for his conduct. On this point, he referred to *Dalton's Sheriff*,

105. who cites *Keitway* 119, 120. *Roll. Abr.* 552. O. 9. translated and incorporated in 20 *Vin. Abr.* 458. pl. 9. *Ibid.* 459. pl. 1. *Ibid.* 460. pl. 1.

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2. That an administrator, as such, cannot be possessed of a close which may be broken ; for which trespass *quare clausum fregit* will lie. The gist of the action is the *breaking of the close* ; the taking afterwards is like any other taking. If *Bell* had, by his will, devised lands to his executors to be sold, that circumstance should have been stated, and that thus it became their close. But no *property* whatever is alleged in this declaration ; and that omission is fatal even after verdict.(a)

(a) 2 *Morg.*  
*Att. Vade*  
*Mecum*, 236.  
tit. *Pleadings*  
in *Trespas*,  
div. 9.

3. That slaves being *living things*, and *rational*, as we must intend, could have no *value* ; but might have had a *price*. If, in a declaration, you state the *value* of a *living thing*, it is fatal.(b) This holds good, as well in trespass as detinue.

(b) *Style's*  
*Rep.* 182.  
*Dell* and  
*Brown*.

On the merits, he contended, there was no proof of any gift of the slaves to *Bell*, so as to make his possession of them an exception to the general provisions of the law concerning gifts of slaves.(c)

(c) See *Rev.*  
*Code*, vol. 1.  
c. 103. p. 192.  
s. 47, 48.

*Williams*, for the appellees. In this case, Mr. *Warden* seems to suppose that he is at liberty to except, as upon a *special demurrer*. He ought to recollect, however, that it is a *demurrer to evidence* ; which will be considered by the Court as a general verdict. This is the law, both of *England*, and this country.(d)

(d) 2 *Wash.*  
203. *Stephens*  
v. *White*.

The first objection of Mr. *Warden*, is to the action itself, in being brought against the High Sheriff for the act of his deputy. After the decisions of the Courts of *England*, in *Saunderson v. Baker* and *Martin*(e) in the *Common Pleas*, of *Ackworth v. Kempe*(f) in the *King's Bench*, and of *James v. McCubbin*(g) in this Court, the question is forever at rest. In the case in *Douglas*, all the authorities were reviewed, and those relied on by Mr. *Warden*, were expressly overruled.

(e) 2 *Win.*  
*Black.* 832.  
3 *Wils.* 309.  
8. C.  
(f) *Deug.*  
40.  
(g) 2 *Call.*  
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(a) See *Rev.*  
*Code*, vol. 1.  
c. 92. p. 166.  
s. 46.

As to the exception that the appellees, in their character of administrators, could not have a close, it is unnecessary to be considered, *on the general doctrine*. This is a case where they were authorised and required to retain possession, under the particular provisions of our own laws, (a) for the purpose of finishing the crop : and if a case *can* be made out which will support the action, the Court, after a general verdict or demurrer to evidence, will presume it was proved to the Jury. Even admitting that some parts of the declaration state improper grounds of action, yet there are others clearly good, and, after verdict, the Court will intend that the Jury gave damages for the actionable parts only of the declaration. (1)

The objection, that no *property* is stated in the plaintiffs, arises from a misconception of the effect of the declaration. But whether it be so or not, is immaterial after verdict. (b) So, with respect to *price* or *value* ; if both had been omitted, it would have been aided by the statute of *jeofails*. In *detinue*, where you go for the specific thing, it is necessary to state the price or value ; and the omission, on special demurrer, might be fatal ; but in *trespass* or *trover* it is not material. (c)

(c) 20 *Fin.*  
535. pl. 4. 2  
*Wash.* 192.  
*Pearpoint v.*  
*Henry.*

It may be said that the administrators should have declared in their own names. To this objection it may be answered, that wherever the property, or damages, if recovered, would be assets, it is not error to declare in the character of representatives of the deceased. Indeed, the plaintiff may declare in either way. (d)

(d) 4 *Term*  
*Rep.* 277-281.  
*Cockerill* and  
wife, Execu-  
trix of *Moody*,  
*v. Kynaston.*

It will probably be contended, that, this being a declaration in trespass, the word *whereas*, in the commencement will vitiate it. But since the decision of the Court of King's Bench, in *Douglas v. Hall*, (e) and of the Common Pleas, in *White v. Shaw*, (f) the law has been considered as settled, that it is well enough after verdict.

(e) 1 *Wils.* 99.  
(f) 2 *Wils.*  
203.

(1) See 2 *Johnson's (N. Y.) Rep.* 283. *Steele v. Western Inland Lock Navigation Company.* *Ibid.* 442. *Phetteplace v. Steele*, and the cases there cited.

The merits of the case are clearly with the appellees. From the facts stated in the demurrer to the evidence, a Jury ought to have inferred, and the Court will presume a gift to *Thomas Bell*; consequently, the continued possession in him, excepted the case from the operation of the statute to prevent fraudulent gifts of slaves, and the taking by the Sheriff was clearly a trespass.

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*Randolph*, in reply. The declaration charges an entry into the *plaintiffs'* close, and taking away slaves *belonging to the estate* of their intestate. This, then, is a mixed demand, for an injury done to the *plaintiffs* and to their *intestate*. The damages for breaking the close, belong to the plaintiffs *in their own right*; those for taking away the slaves would be *assets*. No principle is better established than that you cannot join in the same action, a demand in your own right, and in a representative character. It is said, however, that the slaves were employed on the land of the intestate, in finishing the crop. This is not stated in the demurrer to evidence, nor can it be presumed.

But the *quod cum* in the declaration, is decisive of the question. This Court has decided, during the present term, (a) that the *quod cum* in a declaration in trespass is fatal.

(a) *Hord v.*  
*Dishman*, vol.  
2. p. 595.

[Judge ROANE. There was some difference of opinion on the point, whether the *quod cum* would be fatal *after verdict*. In the case of *Hord v. Dishman*, there was a general demurrer filed by the plaintiff to the defendant's plea.]

*Randolph*. There can be no difference on this point, between a general demurrer and a verdict. So much dignity is attributed to a verdict, only from the presumption that the Jury have drawn all the necessary inferences from the evidence.

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Friday, October 28. The Judges delivered their opinions.

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Judge TUCKER. Several exceptions were taken to the declaration, by the counsel for the appellants.

1. That an action of trespass does not lie against a High Sheriff for the act of his deputy, *as such*.

If I had ever entertained any doubt upon this point, the case of *Saunderson v. Baker*, (a) and the decision of the Court in *James v. McCubbin*, (b) must have removed it. The law looks upon the Sheriff and his officers as one person: he is to look to his officers that they do their duty; for if *they* transgress, *he* is answerable to the party injured by such transgression; and his officers are answerable *over* to him. (c)

(a) 3 Wils.  
309. 2 W.  
Blacks. 832.  
B. C.  
(b) 2 Call,  
278.

(c) Per  
Black. J. in  
3 Wils. 317.  
2 W. Black.  
Rep. 834. See  
also Doug. 40.  
Comp. 403.  
Cameron et  
al. v. Rey-  
nolds.

(d) Rev.  
Code, vol. 1.  
c. 92. s. 46. p.  
166.

Administrators, *as such*, may, by *possibility*, have a close, under our act of 1792. (d) But I consider that part of the declaration merely as an inducement to the trespass in taking the slaves. Were it otherwise, the Court, after verdict, would intend that the administrators were in possession of their intestate's *plantation* and slaves, under that act.

The blank in the declaration, and the different modes of spelling one of the negroes' names, in the declaration and in the demurrer to evidence, are of no importance. The Court ought to understand the evidence, as a Jury would in such a case.

As this case was decided entirely upon the merits of the case stated in the demurrer to evidence, in the District Court, I shall notice them.

It was an action of trespass, for that one *G. L. Grasty*, a deputy of the defendant, under colour of an execution against the estate of *Zachariah Burnley*, entered the close of the plaintiffs and took and carried away from them certain negroes. Plea, not guilty. A demurrer to the evidence was filed in the cause, which stated, that in *December*, 1795, *Thomas Bell*, testator of the plaintiffs, intermarried with *Sally Burnley*, daughter of *Zachariah Burnley*. That, immediately after the marriage, the said *Burnley*

sent the slaves in question to the said *Thomas Bell*. That they remained in *Bell's* possession till his death in *April*, 1798, a few days before which his wife died. That, on the 23d of *May*, thereafter, an execution issued from the office of the District Court of *Fredericksburg*, at the instance of *John Allen*, against the said *Zachariah Burnley*, founded on a judgment obtained at *April Court*, 1795, which execution was levied on the said slaves. That the sale thereof was forbidden by the plaintiffs, in whose possession they were and had been from the death of *Thomas Bell*. That, at the time of the marriage between *Bell* and *Sally Burnley*, *Zachariah Burnley*, her father, was possessed of a large fortune, consisting of fifty-odd slaves, &c.

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There is some other loose testimony stated respecting the provision which *Burnley* had made for other daughters, when they were married, and the nature of that provision, whether absolute, or only by way of loan. *Zachariah Burnley* DIED in *May*, 1800.

It appears to me that the delivery of the negroes to *Bell* immediately after the marriage, may well be presumed to have been made in consideration of the marriage; and, the possession having remained with *Bell* from that time till his death, no presumption of fraud arises upon that transaction. And, as the demurrer to evidence admits that *Burnley*, at the time of the marriage, had a large fortune in possession, that circumstance is sufficient to rebut any presumption of fraud arising from the obtaining a judgment in the District Court. That judgment does not appear to have been followed by an execution against *Burnley's* estate, at any time before the marriage, nor at any time after, within the year. The personal chattels of *Burnley* were not bound thereby, unless an execution was actually taken out and delivered to the Sheriff. There being no legal lien upon the slaves in consequence of the judgment, there could be no legal impediment to a fair disposal of them: the provision made for his daughter does not seem exorbitant; it must be considered then as a fair disposition of the negroes to her.



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And being so, the property therein could not be subject to an execution sued out more than *three* years after the judgment. By what means the right of suing out the execution at that time was kept alive, or whether it *was* kept alive, does not appear; nor can the Court presume any thing about it, except that, if an execution had been taken out, and delivered to the Sheriff *before* the marriage, so as to have bound the property of the slaves as the property of *Burnley*, it is not probable that so important a fact would have been omitted upon the trial of this cause. I continue of the same opinion as formerly upon this point of the case.

It was, however, noticed at the bar, though not by the leading counsel for the appellant, that this declaration, like that in *Hord v. Dishman*, a few days past, begins with a *WHEREAS*, although the action is in trespass. This, we have decided, was an incurable defect upon a general demurrer. The inclination of my mind, then, was to *HOPE* that it might be aided by our statute of jeofails after a verdict. But, I am reluctantly compelled to abandon that *HOPE*. After an attentive consideration of the principles settled in this Court, in the cases of *Winston v. Francisco*, (a) *Chichester v. Kass*, (b) and *Cooke v. Simms*, (c) I am convinced we cannot sustain this declaration. In every action at common law, there must be an *affirmative* and a *negative*, to make an issue. Here there is no *affirmative*; the whole declaration is mere *RECITAL*; *leading to an affirmative*, but not *containing one*. And, though the statute of jeofails will aid many omissions after a verdict, it will not cure the defect in a declaration, in which the very *gist* of the action, is omitted to be charged.

It is much to be lamented that the inattention of *gentlemen* of the profession to their pleadings should so frequently defeat the substantial justice of their clients' causes; as many late decisions in this Court prove. The publication of them it is to be hoped will operate as a warning to them in future, not to sacrifice their clients' interests, by a degree of negligence, inattention, or want of skill, which it is difficult to excuse.

(a) 2 Wash.  
187.

(b) 1 Call, 83.

(c) 2 Call, 39.

In the present case, I feel myself mortified to decide against the real merits of the case ; but, for the reasons which I have already alleged, I am compelled to say that the judgment of the District Court must be reversed for this fault in the declaration, and judgment rendered for the defendant, the appellant.

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Judge ROANE said, he did not know that he should differ with the Judge, who had preceded him, on the *merits* of the case ; he believed he should concur. But having delivered his opinion, in full, in two former cases,(1) and declared that such a declaration as this could not be supported, he did not deem it necessary to consider the other points in the cause.

Judge FLEMING observed, that it was much to be regretted that so good a cause as this, should be lost by defective pleadings. But, on the authority of cases decided both in *England* and in this country, particularly one during the present term,(2) the Court felt constrained to decide, that the judgment must be reversed.

(1) *Ballard v. Leavell*, M. S. and *Hord v. Dishman*, ante, vol. 2. p. 595.

(2) *Hord v. Dishman*.

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Saturday,  
October 29.

## Aldridge and Claiborne against Giles and others.

A decree of the Court of a County requiring a defendant residing within its limits to execute a conveyance for lands lying in another County, can be enforced upon the person only of such defendant, and does not, of itself, vest any legal title in the complainant. If offered as evidence of such title in an action of ejectment, it ought not to be received.

*Quere.* For what purpose, and to what extent, could it be received as evidence in such action?

*Quere.* Is a decree of a Court of Equity for a conveyance of lands lying within its jurisdiction admissible in an action of ejectment between the parties to such decree, or persons claiming under them as evidence of a legal title, or only as matter of inducement to other evidence?

ON the trial of an action of ejectment in the *Petersburg* District Court, brought by *William B. Giles* and others, against *Jeffery Aldridge* and *John H. Claiborne*, to recover possession of a tract of 206 acres of land, lying in *Dinwiddie* County, "the defendants offered in evidence a decree of "the County Court of *Amelia*, between *Mary Claiborne*, " (under whom the defendants claimed,) complainant, and "*John Tabb*, (under whom the plaintiffs claimed,) defendant, "together with the bill and proceedings in the said cause, "as evidence of a title in the defendants to the land in the "declaration mentioned;" which bill was exhibited on the 24th of *November*, 1791, by *Mary Claiborne*, as widow and relict of *Augustine Claiborne*, deceased, for the purpose of rectifying an error committed in a deed, which, during her coverture, had been executed by her husband and herself, for 400 acres, part of a tract of 1,215 acres, lying in *Dinwiddie* County, and belonging to her in her own right. It was charged that, in consequence of a fraud practised by *Robert Ruffin*, to whom the deed was made, the line which was intended to comprehend *four hundred acres only*, was so run as to comprehend *six hundred and forty-six*; that, notwithstanding this circumstance was well known to *John Tabb*, the defendant, he had purchased and received a deed for the whole quantity of land from *Robert Ruffin*. The decree was that, the defendant having stood out all process of contempt in not appearing and answering the said bill, the same was taken for confessed; and thereupon it was decreed and ordered that, unless the defendant should, at

A decree, that, unless the defendant answer the bill before a certain day, then the tract of land in the bill mentioned, shall be surveyed, and part thereof allotted to the complainant, and that the defendant shall execute to the complainant a legal conveyance for such part, and pay the costs of suit, is not *final*, but *interlocutory only*.

or before the next *May* term, answer the bill, then the 646 acres of land therein mentioned, should be resurveyed by the surveyor of *Dinwiddie* County, and 400 acres allotted to the defendant ; and that the defendant should execute to the complainant, a legal conveyance in fee-simple of all right and title to the aforesaid 646 acres of land, except the 400 to be allotted to him as aforesaid, and that he pay unto the complainant her costs. In obedience to this decree, a survey and plat (which appeared in the record) was made on the 18th of *October*, 1792, of the whole tract contained in the deed from *Claiborne* and wife to *Ruffin*, which was found to contain only 606, instead of 646 acres ; and 400 acres were laid off at the lower end, and 206 acres (the residue) at the upper end thereof. But, on the 24th of *November*, 1798, on the motion of *Frances Tabb* and *William B. Giles*, administratrix and administrator of *John Tabb*, deceased, leave was given them to file a bill of review ; on the ground that the said decree was erroneous, “ because a final decree was pronounced without any answer, and without any interlocutory decree against the “ said *John Tabb* ;” after which the suit abated by the death of *Mary Claiborne*.

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The plaintiffs in ejectment objected to the admissibility of the decree aforesaid, as evidence of a *title* in the defendants to the said land ; “ whereupon the Court refused to admit “ the said decree as evidence of any title in the defendants “ to the said land, because they considered the said decree “ as a decree *nisi*, and not as a final decree ;” to which opinion the defendants filed a bill of exceptions, and (a verdict and judgment being entered for the plaintiffs) prayed an appeal to this Court.

*Botts* and *George K. Taylor*, for the appellants, contended, 1. That the decree ought to have been received as evidence, because all the parties to this suit claimed either under *Mary Claiborne* or *John Tabb*, the parties to the decree ; in support of which point they cited 2 *Esp. N. P.*

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758. Sir T. Raym. 404. *Chichester v. Philips*. 3 Term Rep. 639. *Cross v. Salter*, and also the *Rev. Code*, 1 vol. c. 151. s. 53. p. 306. to shew that a decree in Chancery is equally obligatory with a judgment at common law, and may be carried into effect by the same writs of execution.

2. Though the land lay in *Dinwiddie*, and the decree was obtained in *Amelia*, it operated upon the *person* of *John Tabb* to compel him to make a title, notwithstanding it did not, of itself, convey a complete title ;(a) and therefore, he had no right to maintain an ejectment for the same land ; the decree being in force against him.

3. This was a *final* decree, the Court having proceeded to give *costs* ; and though, if erroneous, it might have been reversed by the Superior Court of Chancery, yet, that having never been done, the District Court of *Petersburg* could not reject it for *error*. But, in fact, there was no error ; for the practice of serving a decree *nisi* on the defendant previous to a final decree, is not directed by law, but a mere usage of the Courts of Chancery. Yet, even if this was a decree *nisi* only, it was still sufficient to prevent *Tabb*, or his representatives, from recovering in ejectment, and ought, as a decretal order, to have been received in evidence.(b)

(a) See *Farley v. Shippen*,  
*Wythe's Rep.*  
p. 135. *Guer-*  
*rant v. Fowler*  
and *Harris*,  
1 Hen. &  
*Munf.* 5.

(b) 2 *Esp.*  
758.

*Hay*, for the appellees, observed, that the question in the District Court, was not whether the decree was *evidence*, (in general terms,) but whether it was *evidence of title* in *Mary Claiborne*. It was offered for this express purpose, and therefore, was properly rejected ; for the Court could only decree a conveyance to be made by *John Tabb*, but could not decree a *title*, since all the authorities are conclusive that no title passes without a deed : for though she had taken her writ of *habere facias possessionem*, and obtained possession of the land, she would still have had no *title*.

To this it was objected that, notwithstanding the decree was offered for an improper purpose, *as evidence of title*, the Court ought not to have rejected it *altogether*, but to have received it *for the proper purpose*, which was to bar the action of ejectment ; or, at any rate, as *inducement* to other evidence which the defendants might have adduced ; to shew, for example, Mr. *Tabb's* acquiescence in the decree.

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*Hay* denied that the evidence of the decree could operate to bar the ejectment ; for surely a *decree in Chancery* could not have a greater effect than a *judgment in ejectment*, which, it is well known, cannot be given in evidence in opposition to another action of the same nature for the same land.

He contended that a bare inspection of the decree proved it to be *interlocutory* and not *final* ; and, although in this collateral way, its *propriety* could not be investigated, yet its *character* must ; to ascertain whether it be a decree or not. Every order of a Court of Chancery is either *interlocutory* or *final* ; and, of course, any order which is not *final*, must be *interlocutory*. There is, therefore, no definition of an *interlocutory* decree ; but a *final* decree is that which *concludes* the cause ; after which no order remains to be made by the Court.(a) If, in this case, the Court, upon the return of the survey, had decreed *Tabb* to convey, then it would have been *final*. The practice is uniform in this country, whenever a party is directed to do a thing, "*unless*" he comply with certain conditions, that his failure to do so must be entered on the record, previous to, or at the time of, the final decree ; and such conditional order is called a decree *nisi*. But, if the plaintiff had applied to the Court to make this decree *final*, it would not have done so, because *Tabb* had no notice of the decree *nisi*, a copy of which ought to have been served upon him.

(a) *Hind's*  
*Ch. Prac.*  
429. 3 *Tuck.*  
*Bl.* 452.

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Thursday, November 3. The Judges gave their opinions.

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Judge TUCKER. On the trial of this cause, the defendants offered in evidence a decree of the County Court of *Anelia* between *Mary Claiborne*, under whom they claim; and *John Tabb*, under whom the plaintiffs claim, as evidence of a TITLE in the defendants to the lands in question, whereby it was ordered and decreed, that, unless the defendant, (*John Tabb*), who was in contempt for not appearing and answering the bill, should, on or before the *May* term then next, (1792,) answer the complainant's bill, then the 640 acres of land in the bill aforesaid mentioned (lying in the County of *Dinwiddie*) be resurveyed by the surveyor of *Dinwiddie*, and that he allot to the defendant, 400 acres, according to the contract and plat of land in the said bill mentioned; and that the said defendant do execute to the complainant, a legal conveyance in fee-simple, of all right and title to the aforesaid 640 acres, except the four hundred to be allotted to him, as aforesaid; and that he pay the complainant her costs.

To the admissibility of which decree as evidence of a title in the defendants to the said lands, the plaintiffs objected; and the Court refused to admit the same as evidence of any TITLE in the defendants; because they considered the decree as a decree *nisi*, and not a *final* decree. And thereupon the defendants tendered a bill of exceptions, which was allowed.

I find it laid down as a general rule, that, wherever a matter comes to be tried in a *collateral* way, the decree, sentence or judgment of *any Court*, having competent *jurisdiction*, is conclusive *evidence* of such matter; and, in case the determination be FINAL in the Court of which it is a decree, sentence or judgment, such decree, sentence or judgment, will be CONCLUSIVE in any other Court having concurrent jurisdiction. (a)

(a) *Bull. N.*  
*P. 244. 2 Esp.*  
*758. 1 Harr.*  
*Ch. Prac. 583.*

In consequence of the first part of this rule; if, in ejectment, a question arose about the marriage of the plaintiff's father and mother, a sentence of the Ecclesiastical Court, in

a cause of jactitation, would be conclusive evidence.(a) But this part of the rule must be taken with this restriction, that the matter determined by such decree, sentence or judgment, was determined, *ex directo*, and not in a *collateral* way. As if a suit were instituted in the Ecclesiastical Court by *A.* against *B.* for a divorce for adultery with *D.* and she were to plead that she were married to *D.* and, upon proof made, the Court should so pronounce, and accordingly dismiss *A.*'s libel; yet that would be no evidence in an ejectment in which the marriage between *B.* and *D.* came in dispute.(b) But, if a man devise lands by the force of the statute of wills, the probate of the will in the Spiritual Court, cannot be given in evidence; for all proceedings there, relating to lands, are *coram non judice*. c) This last case is, in principle, apposite to that before us. The Courts of *Westminster-Hall* take notice *ex officio* of the jurisdiction of all inferior Courts; and, where they proceed in any manner whatsoever beyond their proper bounds, reject their proceedings as evidence. So, in this country, the superior Courts are bound to take notice of the jurisdiction of all inferior Courts, whether brought before them *directly*, by appeal or writ of error, or, *collaterally*, as in the present case. We are bound then to take notice, that the County Courts have limited *local* jurisdictions, and neither, as Courts of Law, can hold pleas concerning lands lying in any other County, nor, as Courts of Equity, can act *in rem*, as to any such lands, although they may act *in personam*, as to any defendant *residing within* their jurisdiction.(d) Now, here, the decree is partly *in rem* and partly *in personam*. For it directs the lands to be surveyed though lying in *Dinwiddie*, another County,) and 400 acres thereof to be allotted to the defendant. So far the decree is *in rem*. Then, as to the remainder of the decree, it directs the defendant to make to the complainant a *legal title* in fee-simple, for all of the 640 acres which shall remain after allotting the 400 acres to him.

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(a) *Carth.*  
225.

(b) 2 *Wilson*,  
122. 127.  
*Robins* v.  
*Crutchley*.

(c) *Bull. A.*  
P. 264, 265.

(d) 4 *Inst.*  
213.

This is such a decree as a Court of Chancery may regularly make against a defendant residing within its limits. But



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it is such a decree as could never be carried into execution by any process whatsoever, if the defendant should obstinately persist in refusing to perform it, by executing a conveyance: and, since the Court, in this case, could not act *in rem*, until the decree *in personam* be performed, the complainant cannot have a *legal*, but merely an *equitable* title to the lands mentioned in the decree. And, though Courts of Equity consider that as done, which ought to be done, *Courts of Law* DO NOT. The decree, then, as it relates to the survey and allotment of the 400 acres of land in another County, being *coram non judice*, and, as it might operate, *in personam*, against the defendant, *John Tabb*, being *executory* only, and not vesting a *LEGAL* title in the complainant, but an *EQUITABLE* one only, was, I think, rightly rejected as evidence of a *TITLE* on the trial of the ejectment in a Court of Law. These principles, I consider, as settled in the case of *Penn v. Lord Baltimore*, 1 *Vez. Rep.* 454. and the cases of *Farley v. Farley*, in the late Chancellor *Wythe's Reports*; and *Guerrant v. Fowler*, &c. 1 *Hen. & Munf.* 5. before the present Chancellor of the *Richmond District*, appear to me to be also bottomed upon the decision in the former case. In 1 *Fonb.* 34. this matter is explicitly stated, note (9): "Where the subject in dispute is *not* "within the jurisdiction of the Court, it is certainly true "that the decree of the Court operates *MERELY in per-* " *sonam*; but, if the lands lie *WITHIN* the jurisdiction of the "Court, and the defendant *refuse to perform the decree*, (as "to give the plaintiff *possession*,) the Court will enforce its "decree by a writ of assistance, which is for that purpose "directed to the sheriff." (a)

(a) See also  
3 *Atk.* 587.

Upon these grounds, whether the decree be considered as *final*, or as an *interlocutory* decree only, (in which light it appears to me,) I am of opinion the judgment of the District Court ought to be affirmed.

Judge ROANE. This case is extremely plain. On a trial involving the legal title, *only*, of the land in controversy,

the defendant offered, as evidence of a title, a decree which is not only interlocutory, but, if final, did not convey the legal title. The opinion of the District Court, therefore, is clearly correct, unless it be that it does not go far enough, as it seems to bottom itself only upon the position, that the decree is a decree *nisi*, and not a final one. I am, therefore, of opinion, that the judgment be AFFIRMED.

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Judge FLEMING. The points submitted to the consideration of the Court by the counsel are, 1st. Whether the decree of the County Court of *Amelia*, made the 22d day of *March*, 1792, in a suit between *Mary Claiborne*, plaintiff, and *John Tabb*, defendant, was a *final* or an *interlocutory* decree only? and, 2d. Whether the decree, with the record, in that suit was, or was not, proper evidence to go to the jury, on the trial of the ejectment in the District Court of *Petersburg*?

It appears, on inspection, to have been a decree *nisi*, and therefore not *final*, but *interlocutory*; the parties still remaining in Court, and a day being given to the defendant, *Tabb*, to answer the bill of the plaintiff; although the administrators of *Mr. Tabb*, on the 24th *November*, 1798, on motion to the County Court of *Amelia*, obtained leave to file a bill of review to the said decree, and immediately filed the same, in which they state the said decree to be *final*; and a *subpæna* issued against the said *Mary Claiborne* to answer the bill of review, on which *subpæna* the sheriff made a return "not found;" and on the 17th day of *August*, 1801, the said suit was abated on the death of the said *Mary Claiborne*.

It appears to me that the Court was correct in refusing to suffer the said decree, with the record annexed, to go as evidence to the Jury, on the trial of the ejectment, as it gave no title to the defendants; and I believe it is a point not yet settled, that a County Court has jurisdiction to decree a title to lands lying in another County; (a contrary opinion

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seeming to prevail ;) but, on this point, I give no opinion, as I think it an important one that ought to be decided on solemn argument.

### Argenbright against Campbell and Wife.

A *parol promise* by a father to his daughter's husband before the marriage, is a sufficient consideration to sustain a written agreement made after the marriage, if such written agreement be otherwise sufficient under the statute of frauds. So also, if the marriage be had on the father's request.

Under circumstances, a written instrument was declared to be a good bond, with collateral condition, though the obligor's name was not signed opposite to the seal, but between the penal part and the condition, and the name of the obligee was signed at the foot of the condition, with the seal annexed; both signatures being attested by the same witnesses.

ANDREW CAMPBELL and Rebecca, his wife, exhibited their bill in the County Court of *Augusta*, against *John Campbell* and *Augustine Argenbright*, praying for the conveyance of a tract of land which they claimed by virtue of a verbal promise, in consideration of marriage, made by the said *John Campbell*, father of the complainant, *Rebecca*, before, and at the time of the marriage, and evidenced by writing afterwards; which land they charged, had been purchased by *Argenbright*, with full notice of the marriage agreement.

The case, as made out by the bill, answers, exhibits and depositions of witnesses, (which last were various, complicated, and not easily reconciled,) was briefly this: *John Campbell*, upwards of eighty years of age, made a will, and deposited it with his attorney, who drew it, by which he

A mistake in a writing referring to another, may, in a Court of Equity, be corrected by the writing referred to.

*A.* being in treaty for the purchase of a tract of land offered for sale by *J. C.* was informed by *A. C.* that he had a claim to it. *A. C.* also inserted in a newspaper an advertisement cautioning all persons against purchasing; and caused to be recorded a bond of *J. C.* binding himself not to revoke a will, in which he had devised the land in question to the wife of *A. C.* which bond was also shewn to *A.* before he concluded the purchase. These circumstances were sufficient to constitute *A.* a purchaser with notice, notwithstanding, having seen the will, he had discovered a misrecital of it in the bond, and was advised that he might safely purchase.

Where husband and wife sue, in right of the wife, for a title to a tract of land, the conveyance should be decreed to be made to the wife only.

gave the land in question to his daughter *Rebecca*, subject to an estate for his own life, and the payment of 50*l.* to his youngest daughter, *Hannah*. Previous to the marriage, it is stated by *James Campbell*, father of *Andrew*, that a conversation took place between the said *James* and *John*, in which they mutually expressed their satisfaction with the intended marriage; that *John Campbell* promised *Andrew* (who was present at the latter part of the conversation) the aforesaid land, "if he married his daughter *Rebecca*," provided he complied with the contents of his will, and then repeated the will in substance as above mentioned; that after the marriage, *John Campbell* renewed his promise, and referred *Andrew* to his attorney, who had the will in his possession, to see the contents of it, and to ascertain whether it was sufficient to effect the above purpose. The attorney having informed *Andrew* that the will would be sufficient, if not revoked by *John Campbell*, which he had always power to do, it was determined by *Andrew* to obtain a writing for the purpose of securing the land. The following bond was accordingly drawn, and executed in the manner here stated.

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"Know all men by these presents, that I, *John Campbell*, of the County of *Augusta* and State of *Virginia*, am held and firmly bound unto *Andrew Campbell*, in the just and full sum of four hundred pounds current money of *Virginia*, to be paid unto the said *Andrew Campbell*, his certain attorney, his heirs, executors, administrators or assigns; for the true payment whereof I do hereby bind myself, my heirs, executors and administrators, firmly by these presents, sealed with my seal, and dated this 9th day of *May*, 1793, and in the seventeenth year of the Commonwealth.

his

"*Michael Campbell*,  
"*James Campbell*."

"*John X Campbell*,  
mark.

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" The condition of the above obligation is such, that  
 " whereas the above named *Andrew Campbell* hath lately in-  
 " termarried with *Rebecca Campbell*, daughter of the above  
 " named *John Campbell*, and for a consideration, the above  
 " bound *John* hath promised and agreed to give unto the  
 " said *Andrew Campbell* and his heirs forever, that tract of  
 " land whereon he now lives, adjoining the lands of the  
 " *Rev. Archibald Scott, James Campbell, Peter Eagle, Au-*  
 " *gustine Argenbright, &c.* with its appurtenances, after his  
 " decease; and the better to comply with said promise, he  
 " has made his last will and testament, and left it in the  
 " hands of *Archibald Stuart, Esq. of Staunton*, in which  
 " said will he has particularly bequeathed the aforesaid lands  
 " to the said *Andrew* and his heirs for ever, and has pro-  
 " mised that that instrument of writing should be his last  
 " will and testament, so far as it relates to the aforesaid  
 " lands. Now if the said *John Campbell* shall not alter said  
 " will so as to change that part thereof, as relates to the  
 " aforesaid land, and shall not in any manner or form what-  
 " soever convey, or cause to be conveyed, at any time be-  
 " tween this day and his decease, the aforesaid lands, so as  
 " to deprive the said *Campbell*, his heirs or assigns, of the  
 " benefit thereof, according to the full intent and meaning of  
 " these presents, then this obligation to be void, otherwise  
 " to remain in full force and virtue."

" Signed, sealed, and delivered,

" in the presence of *Andrew Campbell, (Seal.)*

" *Michael Campbell.*

" *James Campbell.*"

From the circumstances attending the execution of this bond, it was inferred that a fraud had been practised on the old man in obtaining it. The subscribing witnesses were brothers of *Andrew Campbell*, and state, that the bond was presented for signature on the plantation of *John Campbell*, where *Andrew* and his brother *James* were engaged in cutting down a timber tree; that *Michael* was requested by *An-*

*drew* to attend there for the purpose of being a witness ; but that previously to his coming, *Andrew* had gone to the house of *John Campbell*, and returned with him in order that he might shew him what tree to cut ; that *John Campbell*, on being requested by *Andrew* to sign the bond, consented to do it, if it would be of any service to him ; but said he could not write : whereupon *Andrew* said it would be of service, and that he would write *John's* name, if he would make his mark, which was accordingly done. The witnesses, in answer to interrogatories severally put by *Andrew*, declared that *John Campbell* was "*duly sober*." It was indeed proven, that the young *Campbells* had a pocket flask of whiskey at the tree, but it did not appear that the old man drank any of it. The bond was not read over to *John Campbell* at the time he executed it, nor did he desire to hear it read ; though it was stated by *James Campbell*, that on a former occasion the complainant read it twice to *John Campbell*, who expressed a willingness to sign it, but that the deponent would not suffer it to be executed at his house, lest it should be said, " that as the old man was subject to drink, and the deponent kept a still, an advantage " had been taken of him." *John Campbell* having offered the land for sale, and *Argenbright* being in treaty for the purchase, he was notified by *Andrew Campbell* of his claim to it, who also inserted an advertisement in the *Staunton* paper, cautioning any person against purchasing, and caused the bond to be recorded in the District Court. In his answer, *Argenbright* denies any knowledge of a contract before the marriage ; on the contrary, he believes none existed, as he had heard the complainant, in a conversation with his father and mother, declare that he did not marry *Rebecca* in consideration of the land, but that he would have married her if her father had not given her five shillings. He further states, that understanding that *Andrew Campbell* claimed entirely under the *will* and the *bond*, he (*Argenbright*) obtained, with some difficulty, a sight of the bond, (it not having been then recorded,) and was advised by his

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friends, (who were not lawyers,) that he might safely purchase, unless there was some other objection than the bond, that being considered defective. He also admits, that he saw the will before he purchased, but did not think it corresponded with the bond; that he suspected the bond had been fraudulently obtained; and was finally induced to purchase from the above considerations, as well as having been told by *John Campbell*, that he did not know of his daughter's marriage before it took place, and though he had been frequently solicited by *Andrew* to sign a bond, binding him not to revoke his will, yet he had utterly refused to do it, believing it to be a piece of injustice to his other children, of whom there were five in number. This statement is confirmed by the answer of *John Campbell*, with the additional circumstances, that although he had made such will, yet he never renewed his promise to his daughter further than that he had not altered his will; that *Andrew Campbell* and his father, after the marriage, applied to him to sign a bond, on doing which ten pounds were to be paid, part of the fifty pounds secured to *Hannah*, which *Andrew* refused, saying that he would have all or none; after which he altered his will, and gave his daughter *Rebecca* only an equal part, if she had issue; otherwise nothing. Besides, the positive testimony of *James Campbell*, (which it was attempted to shake, on account of the strong desire manifested by him for his son's success,) proving an agreement before marriage, there were other witnesses who established the fact, that *John Campbell*, on being asked by *James*, why he had made the promise to *Andrew*, unless he meant to comply with it, observed, "that promises and pye-crusts were made "to be broken: if I had not promised the land, perhaps he "would not have married my daughter;" and went on to repeat a story of a man who had obtained matches for all his daughters, by promising them his plantation. The intended marriage was a subject of conversation in the neighbourhood, as well as the disposition of the land to *Rebecca*; the parties were actually married at her father's house, in

his presence, and he made no objection, except (as might be inferred from subsequent conversation) that he was not apprised of the *particular day* of the marriage.

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The bond from *John Campbell* to *Andrew Campbell* was admitted to record at the District Court of *Staunton*, in *April*, 1794, and the deed from the former to *Argenbright*, was executed on the 3d of *May*, 1794.

The County Court made a decree, by which *Argenbright* (who was deemed to have been a purchaser with notice) was directed to convey the lands to trustees, in the decree named, for the use of *John Campbell*, for life, remainder to *Andrew Campbell* in fee; and moreover decreed that *Andrew Campbell* should pay to *Hannah*, the sum of fifty pounds on the death of her father, *John Campbell*. From this decree, an appeal was taken to the High Court of Chancery; and the cause having been remitted to the Superior Court of Chancery for the *Staunton* District, the decree was there *affirmed, in principle*; the Chancellor expressing a doubt whether the conveyance ought to be to *Rebecca* or *Andrew*, or to both jointly, finally directed a conveyance to be made to them both, their heirs, &c. *John Campbell* being then dead, the decree of the County Court was so altered, as to direct an immediate conveyance; giving *Argenbright* time to deliver possession, and the liberty of securing his crops then growing; charging him with the rents and profits since the death of *John Campbell*; and also decreeing the payment of fifty pounds by *Andrew Campbell* to *Hannah*, with interest, from her father's death. *Argenbright* again appealed to this Court.

This cause was argued at the *March* term, 1808, by *Hay* and *Call* for the appellant, and by the *Attorney-General* and *Wickham* for the appellees.

For the appellant, it was contended, that there was not sufficient evidence of a promise before marriage: the fact is alleged in the bill, but denied in the answer, and there are not two witnesses who support the allegations in the bill.



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wife.(a) 1 P. Wms.  
618. *Viscountess Montague v. Maxwell*, cited in 1 Esp. Dig. 103. 6 Eas. 10. *Roberts on Stat. Frauds*, 191.

(b) 1 Foub. b. 1. c. 3. s. 6. p. 168—170.

(c) 1 Foub. b. 1. c. 5. s. 1. p. 335—337. 2 Bl. Com. 445. 2 Vin. 280. 1 Bac. Abr. Gwil. edit. 111. 1 Com. Dig. by Rose, 202.

(d) 2 Call, 185. 188. *Eppees, &c. v. Randolph*.(e) 3 Salk. 96. Cro. Cur. 409. *Townshend v. Hunt*.

(f) Hunt v. Bate.

(g) 2 Bl. Com. 304.

But, even if a promise were proven, it being merely parol, would be void by the statute of frauds ;(a) and evidence of such agreement is inadmissible.(b) The case then stands on the bond only ; and that being executed after the marriage, *for a consideration past*, it was a mere *voluntary bond*, without consideration.(c) A marriage *to be* had, is a valuable consideration ; a marriage *had*, is not ; if it were, it would be easy for a father to provide for his children at the expense of his creditors.(d) It may be objected that marriage is a *continuing* consideration, according to 1 *Powell on Contracts*, 350. but the authorities cited by him(e) do not support his general position. To make a continuing consideration in such a case as this, there should have been a prior request, at least, as in the case in *Dyer*, 272 a.(f) It may well be doubted whether the bond be really the deed of *John Campbell*. It is denied in the answer ; and there is no proof that it was read to him at the time of its execution, as was necessary, he being an illiterate man.(g) There are also strong circumstances to induce a belief that the bond was fraudulently obtained. *John Campbell* was an old man, subject to intoxication ; he was probably enticed to the tree, at which the bond was executed, by the flask of whiskey ; no person was present but the brothers of *Andrew Campbell* ; the treaties were carried on in private ; and the old man probably induced to believe that, by signing the penalty of the bond only, he might avoid the payment of the money, by giving up the land.

But the bond, if proved, will not, *per se*, entitle the plaintiffs to recover, not only because of the suspicious circumstances under which it was obtained, for which reason equity will leave the parties to pursue their legal remedy ;(h) but because the consideration is not sufficient, the marriage being over, and the bond not stating any prior agreement. Nor will a mere voluntary settlement be carried into execution, even if there be no fraud ; for there is a difference between *articles* and a *conveyance* ; the former, though not sufficient to cause a conveyance, may nevertheless support

(h) 10 Ves. jun. 305. *Mortlock v. Buller*.

it, if actually made. These distinctions will reconcile all the cases upon marriage contracts, which are either cases of request, prior agreement, or actual settlement.(a) If the will referred to, in this case, be a true copy, the contract alleged differs from that proved: and therefore no specific performance will be decreed.(b)

If, then, the bond, *per se*, would not be sufficient, parol evidence cannot be united to it; for that would be to make a party liable upon parol, when the statute declares he shall not be.(c)

It is not necessary to plead the statute of frauds; for that is only intended to protect against a discovery.(d)

But if a communication or contract did actually take place, and if it be essential to the validity of the bond, yet *Argenbright* having notice of nothing but the *bond*, is not to be affected by that *contract*.

And even admitting the contract to be good in all other respects, it is unconscionable, and ought not to be enforced in equity, where specific execution is always at the discretion of the Court.(e)

The *Attorney General* and *Wickham*, for the appellees, insisted, that the promise, before marriage, was clearly proven, and was a sufficient consideration to support the bond given after marriage. One witness (*James Campbell*) swears positively to the promise before marriage; others prove the admission of *John Campbell*, that he had made it; for, no other inference can be drawn from his expressions, "Promises and pye-crusts were made to be broken; " if I had not promised him the land, perhaps he would not "have married my daughter." The contents of *John Campbell's* will were also frequently mentioned by him, and the subject of conversation in the neighbourhood; thus proclaiming what provision he had made for his daughter, in order that an alliance with her might be solicited. He did not object to the marriage in this case, as is not only proven by the minister who married them, but may be fairly pre-

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(a) 1 Ves.  
jun. 52. 54.  
*Colman v.*  
*Savrell*. 2  
Stra. 739.  
*Brownsmith*  
v. *Gilborne*.  
(b) 5 Ves.  
jun. 457. *Legh*  
v. *Haverfield*.  
(c) 5 East,  
17, 18, 19.  
3 Bos. &  
Pull. 233.  
*Kent v. Hin-*  
*kinson*.  
*Bridgman's*  
*Supp. to In-*  
*den*, 109. pl.  
71.  
(d) 6 Ves.  
jun. 39. *Sug-*  
*den's L. Ven-*  
*does*, 68. *Ro-*  
*berts on Stat.*  
*Frauds*, 157.  
(e) 1 Foub. b.  
1. c. 4. s. 26.  
p. 326. *Ibid.* b.  
1. c. 5. s. 3. p.  
350. *Ibid.* p.  
178.

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sumed, from the circumstances that the parties were married in his own house, and in his presence. His only complaint was, that he had not been informed of the *particular day*. It would encourage the perpetration of fraud, not to compel him to perform his promise.

Where an instrument is under seal, proof of consideration cannot be demanded; because it carries, on its face, evidence of a good consideration. (a) Although the passage in *Blackstone* has been animadverted on as too general, applying the same rule to promissory notes, yet the doctrine is recognised as it respects sealed instruments. (b) The appellees are not bound to shew any other consideration than the bond; but were the circumstances of the transaction gone into, there would be a sufficient consideration in blood and natural affection. (c) So the promise before marriage, whereby the marriage was induced, would be a good foundation for the bond, because *John Campbell* was bound, in morality, to perform it; like the cases put by Lord *Mansfield*, in *Hawkes and wife v. Saunders*, (d) where a man promises to pay a just debt barred by the statute of limitations; or a man, after he comes of full age, promises to pay a meritorious debt contracted during his infancy, not for necessities; or a bankrupt, in affluent circumstances, after his certificate, promises to pay the whole of his debts, &c. Admitting this bond to be merely voluntary, still it is good between the parties; (e) and *Argenbright*, being clearly a purchaser with notice, cannot be protected.

There is no proof of fraud in obtaining the bond. *John Campbell* had made the promise, and there was no impropriety in endeavouring to induce him to perform it.

As to the bond being signed in the wrong place, it makes no difference. The defeasance was drawn as part of the bond; and all being executed at the same time, it must be considered as one instrument.

No case can be found where the Court has taken notice of the statute of frauds, unless pleaded by the defendant, or stated in the answer. It ought regularly to be pleaded, to

(a) 2 *Bl. Com.*  
446.

(b) See 1  
*Fonb. b. 1. c.*  
5. s. 1. p. 343.  
note. See also  
*Christian's*  
notes to  
*Blackstone*,  
*ubi supra*.  
(c) 2 *Bl.*  
*Com.* 296.

(d) *Cowp.*  
390.

(e) *Cowp.*  
705. *Doc, ex*  
*dem. Watson,*  
*v. Routledge.*  
1 *Fonb. b. 1. c.*  
5. s. 1. notes  
(b) (f) p.  
346, 347.

enable the plaintiff to reply matter which may take the case out of the statute, as part performance, &c.

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*Cur. adv. vult.*

*Monday, October 29, 1808.* The Judges pronounced their opinions.

Judge TUCKER. The bill states, that the complainant, *Rebecca*, is the daughter of one *John Campbell*, one of the defendants; that *he*, before her marriage with the complainant, *Andrew Cumpbell*, at the time thereof, and after it, promised that he would give her the land whereon he lived, subject to the payment of 50*l.* to his daughter *Hannah*, which they were always ready, on their parts, to do. That in *pursuance of this declaration*, he directed his attorney to *make his will*, which was accordingly done; and that they knew of this disposition at the time it was made.

That in a conversation between *Andrew* and the father of *Rebecca*, before their marriage, on the subject of the *marriage portion intended for his daughter*, the father informed him of the disposition he intended, and which he then promised *Andrew* to make, of that land, *of the will he had made* to that effect, and that he had deposited it with an attorney who had drawn it.

That *after* the marriage, the father repeated the same thing, and desired him to apply to his attorney for satisfaction and advice, &c. &c. and being answered that the will was liable to revocation, the father agreed to execute any conveyance which should not divest him of the land during his life, as he honestly intended to fulfil his promise.

That accordingly, *Andrew* took advice as to the mode of finally securing himself *and his wife* the lands, and for that purpose had a bond drawn *conditioned* for the conveyance of the same; *agreeably to his ORIGINAL PROMISE*, which the father executed.

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That thereupon the complainants rested satisfied that, at the death of the father, who was upwards of eighty years old, the land would be theirs ; but they were afterwards surprised to hear that the father was about to sell the lands to the defendant, *Argenbright* ; that he well knew of their claim before he proposed purchasing, and that they not only made known their claim to him, but published the same in a newspaper. That after this, both defendants went to the house of the attorney who had the will in possession, and took it away ; and that the father and *Argenbright*, after such information, entered into a contract for the lands, which have been actually conveyed accordingly.

The bill prays for a conveyance to the complainants of the lands in the condition of the bond mentioned, which is referred to, and prayed to be taken as a part of the bill.

The defendant, *John Campbell*, by his answer acknowledges, that some time before the marriage he made his will, and left the land to his daughter *Rebecca*, upon condition of her paying ten pounds *per annum*, until 50*l.* should be paid to his daughter *Hannah*. That he never knew *Rebecca* was going to be married to *Andrew* till the very day they were married ; and that “ he never renewed the promise ” before their marriage, further, than that he had not as yet altered his will. That shortly after the marriage, *Andrew*, and his father, *James Campbell*, applied to him to have possession, and *Andrew* wanted him to sign a bond, or paper, that the land was to be his at *John's* death ; and, at the time the bond was to be executed, *Andrew* was to pay 10*l.* part of the 50*l.* to *Hannah*, but when the bond was presented, *Andrew* refused to pay the 10*l.* but said he would have all or none ; after which he altered his will.

As to the bond mentioned in the bill, he solemnly declares that he never signed A BOND THAT CONVEYED THE LAND FROM HIM TO THEM ; if he did, he must have been DRUNK OR MAD, as *Andrew* had frequently applied to him to have a bond, but was as often refused. That he then applied to him only to sign a bond to please *Andrew's* father, and it should be given back to him again and destroyed.

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He denies remembering any such conversation as that stated, advising *Andrew* to consult with Mr. S. to know whether the will was sufficient to secure the estate to *Andrew*; admits the sale to *Argenbright*, and that he knew of the complainants' claim, but was to run his chance.

The defendant, *Argenbright*, in his answer says, he knew of no contract between the plaintiffs and *John Campbell* before, or after their marriage, for the land in the bill mentioned: on the contrary, in a conversation with *Andrew* and his father and mother on the subject, a few days before he purchased, it was expressly several times mentioned by all the parties, that he did not marry the other complainant in consideration of any such contract, but that he should have married her if her father had not given her five shillings; and that he understood at the time, that *Andrew* claimed altogether under the bond and will alluded to in the complainant's bill; that he desired to see the bond, which was at first refused, but at length he got a sight of it, and was advised that he might with safety purchase. That the other defendant, *John C.* told him he knew nothing of his daughter's intended marriage till the day it took place, and had been solicited to give such a bond as in the bill mentioned, but had refused. He states, that he is the more convinced that the bond must have been obtained by fraud and circumvention, (as *John states*,) either by *Andrew* or his father, as *John* was an old man much subject to intoxication, and they kept a distillery; and the witnesses are two young men, *Andrew's* brothers.

*James Campbell*, father of the complainant, *Andrew*, swears that, several years before, *John Campbell* made his will, and lodged it in his hands, where it remained about two years; by which he left the land he lived on to his daughter, *Rebecca*, on condition of paying his daughter, *Hannah*, 50*l.* in five years after his death; that, some time after, he took away his will, that he might get Mr. A. S. to draw it properly. That he afterwards told *James* it was done, but that he had not altered the former in substance,

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and repeated the contents, which he thinks were the same. That, about six weeks before the complainants were married, *John* asked him if he was satisfied that they should intermarry, to which *James* made no objection; and, in answer to a question says, that at that time he had had no conversation with his son on the subject of his marriage, nor until a few days before it took place.

He further states, that a few days before the marriage, *John* came to his house, and, after some private conversation between him and *Andrew*, *James* was called in, and *John*, in his presence, gave *Andrew* his hand and promise, "That if he married his daughter, *Rebecca*, he should have the plantation he then lived on, PROVIDED HE COMPLIED WITH THE TERMS OF THE WILL:" and then repeated the contents of it; the same in substance which he had formerly done to the witness. That, after the marriage, he often heard *John* speak in the manner above stated, and particularizes one occasion when he asked old *Campbell* "if he did not mean to comply with his promise, why he made it?" To which the old man replied, "If he had not done so, perhaps the complainant would not have married his daughter:" "and that promises and pye-crusts were made to be broken; and told a story of a man having married all his daughters by promising them severally his plantation, and that the last had taken him in, by obtaining a writing, as the complainant was then going to do." *Peter Eagle*, whose testimony I shall notice presently, gives, I think, a different and important turn to the complexion of this testimony. This witness, *James Campbell*, the father of *Andrew*, is the ONLY witness who pretends to have been privy before the marriage to any promise, agreement or conversation whatsoever between *John* and *Andrew Campbell*. *John Quinn*, indeed, speaks of the conversation between them after the marriage, in which *James* is stated to have asked *John*, if he did not mean to comply with his promise, why did he make it? To which *John* replied, that promises and pye-crusts were made to be broken, and also said,

" If I had not promised him the land, perhaps he would " not have married my daughter," and then went on to tell the same ridiculous story. But *Peter Eagle*, who was present at the time, states that *James* asked *John* if he had not promised *Andrew* the land; to which he replied no: That *James* two or three times, and perhaps oftener, repeated the question; at length *John* replied, promises and pye-crusts were made to be broken, and then told the same story, but does not recollect that he said, that if he had not promised the land, perhaps the complainant would not have married his daughter. I therefore think, that the testimony of *John Quinn* and *Peter Eagle*, may be considered nearly as balancing each other, leaving that of *James Campbell* to stand or fall by itself.

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And the story told by the old man, which may be regarded as an evidence of his shrewdness, may, in my opinion, well be compared with Sir *John Lee's* repeating scraps of Latin, and reading the classic authors, which Lord *Hardwicke* justly rejected as proofs of his sanity, in the case of *Bennet v. Vade.*(a) The repeated endeavours of *James Campbell* to extort an answer from the old man, to an ensnaring question, lessen in my estimation, or rather destroy the weight it might otherwise have had; but, taking his reply in the most liberal sense, it amounts only to an acknowledgment of a *parol* promise, of some sort or other, without identifying the terms or nature of it.

(a) 2 Atk.  
324.

According to *James Campbell's* testimony, *John* consulted him upon the intended marriage six weeks before it took place; and, a few days before, made *Andrew* the promise stated in *James's* deposition. *John*, in his answer, flatly denies that he knew any thing of the intended marriage until the very day it took place; and, in answer to a question in the bill, " Whether he did not promise his lands " to his daughter *long* before her intermarriage with *Andrew*; and whether he did not *renew his promise* to them, " or either of them, shortly before the marriage;" after admitting that he had made his will, and left the lands to his




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daughter upon the condition of paying *Hannah* 50l. and, after declaring that he never knew of their intended marriage till the very day, he answers, *that he never renewed the promise before their marriage*, further than that he had not as yet altered his will. It will be admitted that this answer is not in as direct and positive terms, as it might have been expressed in: but I understand it as a substantial denial of any promise made *in consideration*, or even in *contemplation*, of the marriage intended between the parties; and, taken in opposition to *James Campbell's* evidence, contains a necessary, if not a direct negative, to the conversation stated to have taken place *a few days before the marriage*. His answer then stands upon the general ground, that an answer shall prevail, unless it be contradicted by two witnesses at the least, or one witness and pregnant circumstances. These are utterly wanting in this case. On the contrary, every circumstance appears to me to be strongly against the complainant, *Andrew*, and his most material witnesses. The credit of *James Campbell* is greatly shaken, in my opinion, by the evidence of *Mr. Bowyer*, who says he appeared to him *to be the most immediately interested* in the dispute, and said that he would spend not only his own plantation, but every thing else he possessed, but his son *Andrew* should get the land. The deposition of *Samuel Woods* is also calculated to weaken the credit of *James Campbell*, for he says that *James Campbell* said, in his presence, *he knew nothing of the marriage till the evening before*, which is an absolute contradiction to the assertion of a promise made in his presence *to Andrew a few days before*, in consideration of the intended marriage. The deposition of *Hannah Campbell*, and the uniform declaration of *John Campbell* to several other witnesses, that he knew nothing of the marriage till the day it took place, also contribute to strengthen the credit of *John's* answer, as to this particular point.

But here it becomes necessary to consider the operation of our statute of frauds and perjuries, *Rev. Code*, 1 vol. c, 10. which enacts, that "no ACTION shall be BROUGHT,

“ *whereby to charge* any person upon any agreement made  
 “ upon consideration of marriage, unless the promise or  
 “ agreement upon which such ACTION shall be BROUGHT, or  
 “ some memorandum or note thereof shall be in *writing*,  
 “ and signed by the party to be charged therewith, or some  
 “ other person by him thereunto lawfully authorised.”

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It has on several occasions in this Court happened, that the counsel on both sides have, in addressing themselves to the Court, said, that they presumed the Court would consider the *English* decisions on the 29 of *Car. II. c. 3.* as *authorities*, in any case, founded upon our statute, which is nearly, or perhaps exactly, in the same words.

This was done by the counsel on both sides, in the case of *Richardson v. Baker*, (October 22d, 1805, MS.) but that case was decided upon another point. Although this observation was not addressed to the Court on the present occasion, the counsel on both sides have argued the question, as if this *postulatum* had been conceded to them. But I am not prepared to go so far as the gentlemen seem to have supposed. By the ordinance of Convention adopting the common law of *England*, the evidences of that law, being an unwritten law, were necessarily, I presume, adopted; and those evidences, which during a long series of years had received the sanction of the highest Courts of Judicature in *England*, acquired thereby a binding force and authority, which no exposition of a written law could claim a title to; much less, the expositions of a statute which never was acknowledged to be in force in this country, being made near a century after the settlement of the colony. Still less are the decisions of the Courts of *Westminster-Hall* made not only since the revolution, but since the passing of our statute, to be considered as having the authority of precedents in this Court. I shall always respect them as the decisions of great and learned men, but never admit them to CONTRoul my own judgment. Where they convince me, I will adopt them; where they fail of producing that conviction, I shall never feel any obligation upon myself to yield my

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assent to them. Were there no other reason for this resolution, the conflicting opinions of different Chancellors, as to the operation of this statute, and effect of the defendant's relying upon it in his plea, would determine me to be extremely cautious how I should admit the authority of precedents which might operate as the repeal of a most beneficial statute. The true intent and meaning of our statute, according to my apprehension, is to reduce all such *parol* agreements as are mentioned in the purview of it, to the level of a mere *nudum pactum*. This strikes me as the most obvious interpretation of the first words of it, that *no ACTION shall be BROUGHT whereby to charge* a defendant upon any *special* promise, contract, or agreement, therein particularly specified, unless the promise or agreement be in *writing*, and *signed* by the party to be charged therewith, &c. If a Court of Equity assume the right, not only to enforce such agreements, *notwithstanding the statute*, but to extort from a defendant, who relies on it in his plea, either a confession for the purpose of enforcing the agreement, or an absolute denial of it, in order to evade the performance, the temptation to perjury, is such as no man, who seeks to evade a contract fairly made, will probably withstand. The almost universal knowledge of letters in this country, and the perfect facility with which recourse may be had to pen, ink, and paper, and a person who can write, in all cases where the parties are seriously disposed to enter into a contract, obviate the objection, that fraud might be prevented, by compelling the performance of such *parol* agreements; for, in every case within the purview of the statute, the most effectual means of preventing fraud or perjury, would be to construe them as mere *nuda pacta*, where nothing material has been done in performance of them, and the state of both parties remains the same, as before any communication had been made, or agreement concluded between them. And this construction, I am persuaded, if constantly adhered to, would effectually relieve this Court from the dilemma into which the Court of Chancery in

England, has brought itself upon this subject.(a) If a parol agreement, in all the cases provided for by the statute, be considered in the light of a mere colloquium, or inception of a contract, instead of the completion of it, the citizens of this State will soon learn, that, to give effect to their agreements in such cases, they should be reduced to a visible form; and, so long as the implements and the art of writing may be had recourse to as easily as they now may, in this State, it is certainly advisable to discourage every possible temptation to the base crime of wilful perjury, which a contrary interpretation is too much calculated to encourage and promote. It has been observed,(b) that it is clear that the statute intended to prevent fraud, as well as perjury; but, from the purview of it, declaring that *no action shall be brought*, it appears to me that the true intent of it is to prevent the *fraudulent imputation* of a contract, rather than the *fraudulent denial* of one; the danger of the former being much greater than of the latter. And this construction I am the more confirmed in, by the opinion of Lord Loughborough, and the rest of the Judges of the Court of C. P. (except Wilson,) in the case of *Rondeau v. Wyatt*,(c) who says, "If a parol agreement were stated in a Court of Law, and there was a *demurrer*, which would admit the agreement, yet still advantage might be taken of the statute;" and surely equity is equally bound to notice it, though not pleaded, nor relied on in the answer, for it is a public statute, and as such, ought to be noticed by the Court:(d) I am, therefore, of opinion, that, with respect to all promises, agreements, and contracts within the purview of the statute, if not reduced to writing, and signed pursuant to the statute, and if nothing be done in performance of them, whereby the actual state of the parties, or one of them, is *materially* affected; they ought to be considered as *imperfect* and *incomplete*, so as to be incapable of supporting a suit, either at law, or in equity; consequently, that wherever a defendant to a bill, for the specific performance of a parol agreement, pleads and relies upon the benefit of the statute, he is not compellable to answer as to the agree-

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(a) See 1  
Fonb. c. 3. s. 8.  
and notes  
thereon. 3  
Fes. jun. 499.  
2 Hen. Black.  
63. *Rondeau*  
*v. Wyatt*. 4  
Fes. jun. 23,  
24. *Moore v.*  
*Edwards*. 3  
Fes. jun. 38.  
*Pym v. Black-*  
*burne*, note  
(a).  
(b) Fonb.  
181. note (d).

(c) 2 H.  
Bl. 63.

(d) 1 Fonb.  
b. 3. s. 8.

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ment, and *confess* or *deny* it, but may protect himself from such answer by his plea; and where offered and insisted on, it ought to be allowed: for, by compelling a defendant to answer after he has claimed the protection of the statute by his plea, the inducement to perjury, which it is the object of the statute to prevent, will be increased in tenfold proportion.

But where a defendant, without pleading the statute, or relying on it in his answer, confesses the agreement as stated in the bill, and allows the bargain to be complete, and does not insist on any fraud, circumvention or surprise, in obtaining it, it may be truly said, there can be no danger of perjury; because he might (according to my construction) have protected himself from answering, by pleading the statute, had he chosen to do so; and because, having waived the benefit of that protection, (which he must be presumed to have done *voluntarily*,) he hath, by his own acknowledgment, taken away the necessity of proving the agreement.

In this case the benefit of the statute being waived by the defendant, (*nam quisque potest renunciare juri pro se, introducto*,) a Court of Equity will enforce the performance of a contract thus voluntarily confessed, and disclosed to it. But, on the other hand, if he confesses the agreement, but yet *insists* on the *benefit* of the statute, either by way of plea, or in his answer; or, if he denies the agreement altogether, as charged in the bill, without pleading, or insisting on the statute, he may yet claim, and have the benefit of it at the hearing: and if he admits, even, that there was a parol agreement, but that it is *different* from that alleged in the bill, no parol evidence ought to be admitted to prove it. And this doctrine, I conceive, may be fully proved by the following cases, in addition to those I have already noticed.

In the case of *Rondeau v. Wyatt*, (2 *Hen. Black.* 63.) it is said that the true rule seems to be, that if the party admits the agreement in his answer, without insisting upon the statute of frauds, the Court will hold it to be good; for which *Prec. in Cha.* 208. 374. 553. are cited: but,

where the statute is pleaded, and the exceptions in it negatived, the Court of Chancery will not compel the defendant to execute; and *Whaley v. Bagenal*,<sup>(a)</sup> and *Whitchurch v. Bevis*<sup>(b)</sup> are cited. It is added that the Court of Exchequer had also holden, that if the defendant by his answer insists upon the statute, a specific performance cannot be decreed, though he confesses the agreement: and *Stewart v. Careless*, and *Eyre v. Iveson*, cited in *Whitchurch v. Bevis*,<sup>(c)</sup> are referred to. In the case, then, before the Court, the defendant in his answer to a bill in Chancery, admitted the agreement charged in the bill, but pleaded the statute of frauds; and averred that there was no note or memorandum in writing, nor any performance of any part of the agreement.<sup>(d)</sup> A suit being brought in the Common Pleas, upon the contract thus disclosed by the defendant's answer in Chancery, and a verdict for the plaintiff; on a rule to shew cause why the verdict should not be set aside, and a nonsuit entered, Lord *Loughborough*, in delivering the unanimous opinion of the Court, three Judges being present, (the fourth being absent, and, as was afterwards said, being of a different opinion,) said, "in some early cases, *Prec. in Cha.* 208. and 378. (though in fact no such decree was made in those cases, which contain merely extrajudicial opinions of the Lord Keeper or the Master of the Rolls,) it has been said, and has been adopted in the argument of this case, that, when the defendant confesses the agreement, there is no danger of perjury, which was the only thing the statute intended to prevent. But this seems to be very bad reasoning; for the calling upon a party to answer a parol agreement certainly lays him under a great temptation to commit perjury. But, though the preventing perjury was one, it was not the sole object of the statute; another object was, to lay down a clear and positive rule, when the contract of sale should be complete." And the rule for setting aside the verdict, and for entering a nonsuit, was made absolute. His Lordship added, that "it was observable, the case of *Whaley v. Bagenal*, in the

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(a) 6 Brown's

Parl. Cas. 45.

(b) 2 Brown's

Cha. Cas. 559.

(c) 2 Brown's

Cha. Cas. 563;

564.

(d) See 3

Brown's C. C.

154. *Rondeau*

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"House of Lords,(a) coincides with the determination of the Court then made." I accord most perfectly in the opinion of Lord *Loughborough*, and in the reasons he assigns.

(a) 6 *Brown's*  
*Cas. in Parl.*  
45.

In 3 *Ves. jun.* 38, 39, 40. note (a) a review of the cases upon this subject, similar to that in 1 *Fonb. b.* 3. s. 8. in notes, is taken; the reporter concludes that review, by saying, that the result seems to be, that the statute may be used as a bar to the discovery. And in *Moore v. Edwards*,(b) the Lord Chancellor seems to incline to the same opinion.

(b) 4 *Ves. jun.*  
23.

(c) *Ibid.* 91.

Though in a subsequent case, *Bowyers v. Caton*,(c) he appears to have given a different one. But in *Main v. Milbourn*,(d) the plea of the statute, where the defendant had rested upon the plea only, without answering, was allowed; what afterwards became of the cause does not appear.

(d) *Ibid.* 790.

In *Cooth v. Jackson*, 6 *Ves. jun.* 12. Lord *Loughborough*, Ch. and Lord *Eldon*, who succeeded him, were successively of opinion, that, upon a bill for a specific performance of a parol agreement, within the statute of frauds, the defendant, though admitting the agreement by his answer, may, if he insists upon the statute, have the benefit of it at the hearing. Lord *Eldon*, indeed, was of opinion that, if he did not insist upon it, he must be taken to have renounced the benefit of it. But that, I apprehend, must be where the agreement is fully confessed in the bill. I think it unnecessary to examine the cases on this head any further; the reasons given by Lord *Loughborough* in *Rondeau v. Wyatt*, weighing with me more than any authority or precedent to the contrary.

In the present case, the defendant hath not pleaded the statute of frauds, nor relied on it in his answer. And, although it may be thought that he has not sufficiently denied the parol agreement in his answer, yet certainly he has not confessed it, nor even admitted it, as charged in the bill. If the case bore no relation whatsoever to the statute of frauds and perjuries, I should be of opinion, that the answer does contain a sufficient denial of the agreement, to put the complainants upon the proof of it.

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If the cause had been set down for argument, upon the *bill and answer*, only, could the Chancellor have made any other decree, than to have dismissed the plaintiff's bill? I conceive that he could not; for, if the defendant do not answer the allegations of the plaintiff's bill, nor by his answer confess them, although there be *allegata* before the Chancellor, there are no *probata*: and, it was the folly of the plaintiff not to except to the answer,(1) if he relied upon a discovery of facts known to the defendant only; or, not to have proceeded to take depositions to prove the allegations of his bill, if he thought he could obtain such proof elsewhere. What then is the state of the present case; let it be admitted that the defendant hath not, in express terms, denied any agreement; it must also be admitted that he has not confessed, *that which is charged in the bill*, nor admitted any promise whatever made to the plaintiffs, or either of them, in CONSIDERATION of the intended marriage. The promise to his daughter was WITHOUT CONSIDERATION, and being one which was to be performed by his will, was revokable at his pleasure. It was made years before the marriage was in contemplation; and he swears, *he never renewed it*, further than that he did not alter his will. It is true, there is the evidence of a single witness which contradicts this; but, exclusive of the reasons which I have before offered, for thinking this evidence not sufficient to countervail the answer, I shall now hazard the opinion that, although the statute is neither pleaded, nor relied on in the answer, the evidence ought not to be regarded; because it appears *upon the face of the bill*, that the *promise alleged is* WITHIN THE STATUTE OF FRAUDS. We have already seen that in the case of *Rondeau v. Wyatt*, it was held that, if, to a declaration at law setting forth such a case, there should be a demurrer, still the defendant should have the benefit of the statute. And why not if there had been a demurrer to this bill? Hath a Court of Equity the power to annul a

(1) Note by the Reporters. See the case of *Dangerfield and others v. Claiborne and others*, in the Superior Court of Chancery for the *Richmond District*, ante, vol. 2. p. 17.



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public and general statute, any more than a Court of Law? If it hath not, why is it not bound to take notice of the nature of the agreement, in the same manner? And if it be such an one as the statute declares no action shall be brought upon, will it take upon itself to enforce it, *non obstante* the statute? But a precedent may be found, even in a Court of Equity, where the plaintiff set forth an agreement by parol, in one manner, and the defendant acknowledged the agreement as set forth in the bill in sundry particulars, but insisted that the new lease (which was the subject of the parol agreement) was not to commence until the expiration of the old one; making a difference of four years, between the time the plaintiff contended for it to commence. The deposition of a witness was taken, but the Chancellor declared, upon that bill and answer, it would be very dangerous to admit parol evidence on either side; and decided

(a) *Pym v. Blackburne*,  
3 Ves. jun. 34.

upon *the bill and answer ONLY*. (a) In that case, the statute was neither *pleaded* nor *relied on* in the answer; and it appears to me fully to resemble the present case in principle. Should the Court decide that the agreement is not denied *altogether* by the answer, yet, as it appears, on the face of the bill, that the agreement set forth is within the statute of frauds; and the defendant not having *confessed* it by his answer; parol evidence to prove it, *aliunde*, ought to be entirely rejected; and consequently the bill ought to be dismissed.

(b) 1 Ves. jun.  
326.

ed. So in the case of *Brodie v. St. Paul*, (b) where an agreement in *writing* for a lease of a farm, referring to a paper containing the terms specified in certain items, parol evidence, to prove which of the clauses in that paper had been read at a meeting between the parties, though *read* and not objected to by the defendant, was *REJECTED by the COURT*, as being directly *PROHIBITED* by the *STATUTE*, although *neither PLEADED NOR RELIED ON in the answer*; and the

(c) 6 Ves. jun.  
39.

bill was dismissed. And in the case of *Cooth v. Jackson*, (c) Lord Chancellor *Eldon* declared, that if a defendant denies that any parol agreement ever took place, a Court of Equity will not inquire into the truth of *that* denial. The same Judge says in the same page, "all the doctrine of a Court

“ of Equity upon that subject, attributes great weight to  
 “ the oath of the defendant.” And further, that, “ the  
 “ moment that the defendant in the form in which issue is  
 “ joined in that Court, by his answer, says, there was *no*  
 “ *agreement*, the witness could not be heard ; or, if he was  
 “ heard, unless supported by special circumstances giving  
 “ his testimony greater weight than the denial by the an-  
 “ swer, the Court could not make a decree.”

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As to the necessity of *pleading* the statute, there is, per-
 haps, a reason why it is not as necessary to plead this statute,
 as it is to plead the *statute of limitations*, which it may not
 be improper to notice. The date of a contract, where no
 deed or instrument is referred to with a *profert in curia*, is
 never truly set out in a declaration at law : in order, there-
 fore, to bring the contract within the statute, it must be
 pleaded, and then the Court is bound to look at the *true*
date ; but, in cases within the statute of frauds, the *nature*
 of the case must in general be shewn by the declaration, or
 the bill. In such cases the Court is sufficiently apprised of
 the *nature* of the agreement to decide upon the face of the
 declaration or bill ; if the nature of the agreement do not
 so appear, then, indeed, the defendant must apprise the
 Court of it, either by pleading, or by his answer, in order
 to have the benefit of the statute.

But it may be thought that there has been a part-per-
 formance in this case, the plaintiffs having intermarried.
 But it would be a very dangerous precedent indeed, to ad-
 mit that the consummation of a marriage was to be taken
 as the ground to enforce a marriage contract, unless the con-
 tract itself be first fully and clearly proved ; especially when
 it is considered how rare marriage-contracts are in this
 country. In the present case, it is in proof that the plain-
 tiff, *Andrew*, declared he did not marry the other plaintiff,
in consideration of the land, for that he would have married
 her if her father had not promised her *5s.* If then the
 promise alleged in the bill was no *inducement* to the *alliance*,
 the bare circumstance of the marriage, ought not to be reli-
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(a) 1 Hen. &
Munf. 92.

(b) See 3
Bro. Cha.
Rep. 400.
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agreement itself is fully established, which I consider is not the case.

In the case of *Rowton v. Rowton*, (a) the circumstance of the son's having removed himself and his family from *New-River*, in *Montgomery County*, to *Charlotte County*, in consequence of his father's promise to give him the land in question, was not regarded by the majority of the Court, as a sufficient manifestation of the nature of the promise made, for them to decide that he was to have an estate of inheritance in it. And the reason is equally as strong in this case, that the bare circumstance of a marriage having taken effect, between the complainants, shall not be admitted to supply any defect of proof of a promise alleged to have been made in consideration of marriage. (b) But, perhaps, it may be considered that the reference made by *John Campbell* to his will, already made, and in the hands of an attorney, in the conversation alleged to have taken place between him and the complainant, *Andrew*, in the presence of *James Campbell*, before the marriage, will be sufficient to take this case out of the statute of frauds and perjuries. But, I am of a different opinion upon that point; for the statute meant to prevent the imputation of ANY contract, or agreement whatsoever, made, or pretended to be made in consideration of marriage, unless the very promise itself, or some memorandum or note of it be made in writing, and signed pursuant to the statute.

The fact of making a promise in consideration of marriage, is one thing, the terms of the CONTRACT another. The promise itself, and the consideration UPON WHICH it was made, must be in writing, as well as the terms of the gift, or nature of the ADVANCEMENT proposed to be made. The danger of perjury is fully as great to admit proof of a parol promise, made in consideration of marriage, never to alter a will already made, as if the tenor of the will were repeated, in making such promise. The WHOLE PROMISE, or contract then, whatever it be, must be in writing, or it is within the true intent and meaning of the statute, for if there be any part of it which requires parol testimony to

prove it, it is within the mischief, and, as I conceive, the very words of the statute. As where, in an agreement for the lease of a term, referring to a paper containing the term, *parol* evidence to prove which of the clauses in that paper had been read at a meeting between the parties was refused. (a) Nor can you, by any reference to a paper not before the parties, convert into an ENTIRE PROMISE, or agreement in writing, any promise or reference made by *parol* only. To illustrate this, let us suppose *John Campbell* had, at the time of the alleged promise, in fact, made no will; or that his will should afterwards have been destroyed by accident; could this *parol promise*, alleged in the bill, have been set up on the ground of fraud in the one case, or accident in the other?

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(a) *Brodie v.*
St. Paul, 1
Ves. jun. 326.

But, should the Court be of opinion that the defendant, *Campbell*, is chargeable upon this *parol* agreement, we are next to consider whether the plaintiffs are also entitled to relief against the defendant *Argenbright*; who is, I think, a fair purchaser, for a full and valuable consideration, and, as he swears in his answer, *without notice* of this PAROL AGREEMENT, or that the marriage was concluded with a view to the promise of the land which he purchased; and this, he says, he understood from the complainant *Andrew's* own declaration that he did not marry in consideration of any such contract. This is a direct answer to one of the charges in the bill, and to one of the interrogatories put to him: and it is not contradicted by any evidence in the record. I speak now of the PAROL AGREEMENT only, and not of the *bond*, as it is called, which I shall consider hereafter.

Independent of the general rule that a fair purchaser without notice, shall not be affected by any latent equitable claim which another may have upon the lands which he hath purchased; and, independent of the declarations of the complainant *Andrew*, to the defendant *Argenbright*, that he did not marry for the consideration of the land; (which the defendant understood as a disavowal of any claim, such

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as is now set up;) the refusal of the complainant *Andrew* to let him see the bond under which he claimed, until after repeated applications, might have justified him, perhaps, in making the purchase in the mean time. For, as the land was offered for sale by the proprietor, although the complainant by a public advertisement had warned all persons from purchasing, that warning was not sufficient to attach notice to a purchaser, who had personally applied for information of the nature of the complainant's claim, and been refused satisfactory information in respect to it: or who had received information of a claim substantially different in its nature, from that which constituted his real claim. If, for example, the claimant, setting up a claim under a voluntary promise in writing, should represent to the person making the inquiry, that his claim was founded upon a bond or agreement for a valuable consideration actually paid, and the inquirer, being refused a sight of the instrument, should proceed to conclude the purchase, could equity construe this to be such a notice as to impeach the purchaser's title? I presume not. If, then, *Argenbright's* inquiries were answered only by a reference to the bond, and that bond was refused to be shewn; or if, when shewn, it contained no reference to a contract or agreement, made *in consideration of a marriage* intended to be had between the complainants; nor recited such *previous contract*, as the consideration upon which the bond was given, then cannot *Argenbright* be at all affected by this *parol agreement*, between the father and the complainants; although the father himself should be chargeable upon that account.

I proceed now to consider the instrument which is called a bond.

The penal part of the bond is for 400*l.* to be paid to the complainant, *Andrew*, in the usual form; at the foot of which the mark of the defendant *John Campbell* (without any seal) is affixed, and the names of the two witnesses, *Michael Campbell* and *James Campbell*, are written opposite to it on the left hand. Then follows what imports to have

been intended as the condition of the bond ; which recites that whereas the above named *Andrew Campbell*, had lately married with *Rebecca Campbell*, daughter of the above named *John*, and for a *consideration* (not naming any) *John* had promised and agreed to give to the said *Andrew* and his heirs, the land whereon he now lived ; and, the better to comply with that promise, *had made* his last will and testament, and left it in the hands of *A. S.* in which he had particularly bequeathed the aforesaid lands to the said *Andrew* and his heirs for ever, and had promised that that instrument of writing should be his last will and testament, so far as related to that land. Now if the said *John* should not alter his will so as to change that part of it which relates to the land, nor in any manner or form whatever, convey or cause the same to be conveyed in his life-time, so as to deprive said *Campbell*, his heirs or assigns, of the benefits thereof, then the obligation to be void, or else to remain in full force and virtue. Then follows *Andrew Campbell's* name and seal, with the attestation of the same two witnesses who attested the subscription of *John Campbell*.

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Before I proceed to consider the legal character and effect of this instrument, I must observe that, from the manner and circumstances under which it appears to have been obtained, it is entitled to no favour in a Court of Equity.

In the first place, the complainants charge in their bill that the defendant, "*John Campbell*, was an aged man, upwards of eighty years old." *James Campbell*, the complainant's father, says, in his deposition, that *he* would not agree to the bond's being signed at *his house*, lest it should be said, that AS THE OLD MAN WAS SUBJECT TO DRINK, and one or the other (for it is not, from the record, easy to ascertain which) KEPT A STILL, an advantage had been taken of him. The difficulty of understanding which, arises from a word being abbreviated in such a manner as to appear like the word *defendant* instead of *deponent*, but *Argenbright's* answer removes it, and shews it should be *deponent*. The same witness tells us the old man, when it was proposed to

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him to get the Reverend Mr. Scott, to draw the writing, objected to it; observing, that he might tell his wife, and that some uneasiness might be occasioned, if his family and other children should hear of it; after which the complainant had the writing drawn by an attorney in Staunton; according to the information given him by the complainant Andrew, and his father; as appears from Mr. Kinney's deposition. None of John Campbell's family appear to have ever heard, or been present at any conversation or communication whatsoever, respecting this marriage promise or the bond. Every thing passed at the house of the complainant's father, the only witness to the promise; and the active party in the whole business, until it comes to signing the bond, which he avoided being present at; nor would he even permit it to be executed at his own house, lest it should be said (for the reasons above mentioned as assigned by himself) THAT AN ADVANTAGE HAD BEEN TAKEN of the old man.

There are few stronger badges of fraud than such OVER CAUTION. But, where, when, and how was the instrument executed? IN THE WOODS; immediately after the old man had left the house at a place previously appointed for the complainant's two brothers to repair to witness the signing, and whither the old man was enticed by the complainant himself, under the pretext of shewing a particular tree to be cut down, for no other purpose, that appears, but that of getting the old man completely in his power. Stronger badges of fraud never appeared in any Court. The case of

(a) 2 Atk.
324.

Sir John Lee in *Bennet v. Wade* and others, (a) falls far short of it, in my opinion. But what say the subscribing witnesses? James Campbell, jun. tells us the complainant Andrew, and John came to the tree together, where the witness had been previously left by Andrew to wait his return with the old man. That, as soon as Michael, the other brother and subscribing witness came, Andrew offered the old man the paper to sign; to which he said "he was agreed, if it would be of service to him; that he could not write his name." The complainant replied "that it would

"be of service to him, and that, if he would make his mark, HE would write his name." The old man then made his mark accordingly. The instrument thus obtained, was not read to him at that time; and, though *James Campbell* swears it had been read over to him twice, at his house, *non constat*, that it was the same paper, nor that it was read to him truly. A pocket flask full of whiskey, which, as this juggling scene was not to be transacted at the STILL, it seemed necessary to take along with them, ought not to be forgotten in the list of implements employed on the occasion. Is there a single feature of fraud, circumvention and trick, wanting to complete this picture? Every conversation, or communication, upon the subject, either of the pretended promise, or of the bond, took place at *James Campbell's house*; or more probably AT THE STILL; for the one is identified with the other, in *Argenbright's* answer. None of *John Campbell's* family knew, or were permitted to know, any thing of either. The old man is beset and teased with repeated leading, and ensnaring questions; for what else is the conversation sworn to by *John Quinn*, to which *Peter Eagle* was also a witness? The directions for drawing the bond are not given by the party who was to sign it, but by the other party, and his father. If ever read over to him, it was only in the presence of the same parties, and at the still. It was not signed THERE, "lest it should be said that an advantage had been taken;" but, was the case altered by enticing the old man into the woods, and placing the flask of whiskey, the panacea of his dotage, before him? Or can it be said that an instrument, so prepared, offered, and executed, is, either at law, or in equity, the contract of the party signing it? Every agreement to merit the interposition of a Court of Equity, must be free from fraud, circumvention, or suspicion. (a) And to the same effect Lord Chancellor *Eldon* (b) said, "if there were any sort of *surprise he could not decree a specific performance."

I shall now consider the legal character and effect of this uncommon instrument, thus obtained by means not less uncommon. I have before mentioned that the name of the

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(a) 2 See
Powell on
Contracts,
221.

(b) 10 Ves.
jun. 305. *Mort-*
locke v. Bul-
ler.

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defendant *John Campbell*, and of the two subscribing witnesses, are signed immediately under the penal part of the paper, and above what is called the condition, and without any seal prefixed to his subscription; not even a *scroll*, by way of seal. The other party subscribed his name at the foot of what is called the *condition*, and so did the witnesses; and, opposite the subscription of *Andrew*, there is a seal or scroll.

Let it be observed that no *mistake* in the *execution* of this instrument is either suggested in the bill, or by the witnesses; this Court must take it, and construe it, as they find it upon the record. It must stand or fall by its own intrinsic weight, as the act, or acts of the parties respectively, in the *very form in which it appears*, and in no other; and must be interpreted according to the rules of law, as they may be applicable to instruments in that form. There is no proof either upon the face of the instrument, or the attestation of the witnesses, or in their depositions, that the old man ever sealed it, or *acknowledged* and *delivered* it, as his act, and DEED. He merely *made his mark*, probably where he was directed to do it; and the witnesses have proved nothing more. Taking it, then, as under this view of the case it must be taken, it *was a written promise* to pay 400*l.* to *Andrew Campbell*, and nothing more. The words "I bind myself, my heirs," &c. will not make it an obligation, as was determined in the case of *Hites, Executors of Smith, v. Lewis*, in this Court, (a) nor can it be regarded as a DEED, (being *without a seal*), as was determined in the same case. It is then a mere naked promissory note, for the payment of money, and nothing more.

(a) October,
1804. MS.

The instrument signed by *Fielding Lewis*, was couched in as strong terms of obligation as this is; it wanted a *seal*; and this Court pronounced it a mere *nudum pactum* to indemnify *Smith's* executrix for her testator having been the security for the son of Mr. *Lewis*. If, in that case, the want of a scroll, or seal, could annihilate the obligation created by the words "*I hereby oblige myself, my heirs, executors, and administrators,*" will not the same omission

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operate in a similar manner upon this instrument? So far at least as to reduce it to the level of a simple contract debt, for the payment of 400*l.* instead of a *bond* for that sum; or for a conveyance of lands? If so, the party had a full and complete remedy at law, and no pretext whatsoever to bring this bill in a Court of Equity. And, even if this Court should decide, contrary to the decision in *Hites v. Lewis*, that this paper is a bond, though there is no *seal* to it, nor any proof of *sealing* and *delivery*, both of which are necessary to constitute a *deed*, yet, if I am correct, it is a single bond for the payment of money. The execution of the defeasance by *Andrew*, is not proved by the witnesses, nor is its existence at the time, *when the old man made his mark*, at all proved. It might have been an after thought of *Andrew*; a voluntary act done by him, without the agreement, knowledge, or privity of the old man: and, without these, it could only operate to the advantage of the obligor, if he chose to avail himself of it; and not to his disadvantage. And such I understood the principle established by this Court in the case of *Gordon v. Frazer*.^(a) This construction of the instrument is consistent with what the old man swears to in his answer, that he never signed a bond that conveyed the land to the complainant; if he did, he must have been mad or drunk. Apply this to the instrument, as it appears in the record; and it is most strictly true. And, since a Court of Equity attributes great weight to the oath of a defendant, where that oath can be reconciled to the strictest truth by giving to the instrument spoken of a *legal* construction, surely the Court will do so, rather than impute perjury to the defendant, by adopting a different construction. As to the doctrine of defeasances, as contradistinguished from the conditions of bonds, I beg leave to refer to 2 *Black. Com.* 327. 342. and 2 *Saunders, Fowel v. Forest*, p. 47. and the notes on that case. I have premised that no mistake is alleged to have been committed, in the manner of executing this instrument. I did so, by way of anticipating the observation, that equity will construe every deed, or other instrument,

^(a) 2 *Wash.*
130.

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according to the *real intention* of the parties. That intention, since there is no allegation or evidence of a *mistake*, must be collected from the instrument itself ; and, in the construction of it, for the reasons already assigned, equity must follow the law. But what is the condition of that bond, if it be one ? It recites that, “ whereas *Andrew Campbell* HAD lately intermarried with *Rebecca*, daughter “ of the above named *John Campbell*, AND FOR A CON- “ SIDERATION, the above bound *John* had promised, and “ agreed, to give the said *Andrew* that tract of land whereon “ he lived,” &c. Here I would ask what was this consideration ? There is no mention of any whatever : if, instead of a bond to convey, he had executed a conveyance for the land, in all due form, and solemnity, without mentioning any consideration for the gift, what construction would the law put upon such a conveyance ? That it was to the use of the grantor and his heirs, and not of the grantee. But, let it be granted there was A CONSIDERATION ; it might have been a good one ; or it might have been founded upon usury, gaming, fraud, collusion, or otherwise in *malificio*. If to the former class, why was it not inserted ? That it was not founded on any agreement made in consideration of a marriage intended to be had, must be inferred from the omission to insert it ; if it were not founded upon that, the bond could acquire no validity or support from the marriage. If the consideration be not shewn to the Court, will the Court take upon it to decide that it was a good or valuable one, and enforce the performance of the condition ; or leave the party to his action at law, if he can support one upon this instrument ?

Again, the bill charges that the old man said to his son-in-law, after the marriage, that he honestly intended to fulfil his promise ; (viz. that alleged to have been made before the marriage ;) and if his will, which he considered as sufficient to convey the land, was thought insufficient for that purpose, he would give a writing which should be considered so ; and thereupon the complainant had a bond drawn conditioned for the conveyance of the same, agreeably to his

ORIGINAL PROMISE. Does this instrument answer to that character ? The alleged promise was of a GIFT of the land to REBECCA, by his will deposited in the hands of A. S. Esq. upon the condition of the *payment of fifty pounds to his daughter HANNAH*. The condition of this instrument recites a promise made to ANDREW to give HIM AND HIS HEIRS the land ; and that the better to comply with that promise, *he had made his will* and left it in the hands of A. S. "*in which said will he had PARTICULARLY bequeathed the aforesaid land to ANDREW and his heirs for ever,*" and had promised not to revoke that devise. Now, it is not pretended that the name of ANDREW was mentioned in the WILL SO DESCRIBED. It was made long before the pretended promise ; before his courtship was known, or perhaps even thought of by himself. Can this bond, then, pretend any connexion with the promise alleged to have been made in consideration of the intended marriage between the complainants, and with reference to that will ? The recital is proved to be false by the allegations of the bill ; and by the testimony of *James Campbell*, the only witness who pretends to prove a promise made *before* the marriage.

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Is not this an additional badge of fraud ? Is not the attempt to deprive HANNAH of the provision intended for her by her father in his will *out of this land*, a further badge, or rather PROOF of actual premeditated fraud ? And will this Court support or countenance a transaction, every period of which is marked with a blot ? In the case of *Thornton v. Corbin*,^(a) one of the Judges of the Court is reported to have held, that a deed variant from the terms of a marriage promise was not obligatory on the party : and, where the variance is so great as in the present instance, I can feel no doubt of the correctness of the opinion.

(a) 3 Car,
389.

Once more ; suppose the old man had died without altering or revoking his will, or disposing of the land ; and that Andrew had brought a suit at law upon this bond, be-

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cause the land was not given to himself UNCONDITIONALLY, according to the tenor of its condition ; could he have recovered, if it had been shewn that the will was in fact the *same* the old man had made before the marriage, and had deposited in Mr. *Stuart's* hands ? Or suppose that, instead of claiming under the will, he had brought a suit in equity against the heirs of the old man, for a conveyance according to the condition of this bond ; would this Court have decreed HIM the land, in exclusion of his WIFE ? Or would it have decreed it to HIM, *discharged of the payment of the fifty pounds to HANNAH* ? If this Court would not have made either of those decrees, as I presume it would not, is not that circumstance alone sufficient to prove that this bond is a *felo de se* ?

Upon the whole, it appears to me that there never was a case less entitled to the favour, support, or countenance, of a Court of Equity ; and that the plaintiff's bill ought to have been dismissed with costs ; consequently, that the decree ought to be reversed, &c.

Judge ROANE. I will consider this case under two general points of view : 1st. In relation to the promise or promises made before the marriage ; and, 2d. In relation to those made after, and, particularly, to that evidenced by the bond or writing of the 9th of *May*, 1793. Some general considerations, however, appertain to them both, which it will be first necessary to dispose of.

In the first place, it is said that the contract embraced by these promises is *unreasonable*. The answer is, that a father has power to make an unequal distribution of his estate among his children ; and, in the present instance, his resolution, as to the disposition in question, was not hastily taken up, of short duration, or made without due reflection. He had continued in this mind for more than two years, while the will was in the possession of *James Campbell*, and afterwards while it was in the hands of Mr. *Stuart*. The existence and long continuance of this disposition on the part of *John Campbell*, would, in the case

of equiponderant testimony, incline the scale in favour of a promise made in pursuance thereof.

Again, it is said, that the appellant, *John Campbell*, was very old and subject to drink. It is, however, not only *not shewn* that he was in his dotage at this time, but, on the contrary, a considerable degree of sagacity (not to say archness) is inferrable from the conversations and circumstances stated in the testimony. As to his liability to drink, it is not shewn that at any one of the periods in question, he was intoxicated : on the other hand, it is expressly proved that he was *sober* when the writing of *May 9th, 1793*, was executed.

With respect to the imputed ignorance of the marriage on the part of *John Campbell*, and of *James Campbell* and family, the Reverend Mr. *Scott's* testimony gives the proper explanation. That ignorance is only to be applied to the *day* of the marriage, and not to the engagement, or courtship, which the witness says "was talked of in the neighbourhood;" and it is observable that all the witnesses on this point, are merely interrogated as to the *marriage*, (that is, as I understand it, or at least as it might have been understood by the witnesses, as to the *day* of the marriage,) and not as to the courtship, or engagement. We must either adopt this construction, thus supported by *Scott's* testimony, or impute perjury to witnesses who swear positively as to *John Campbell's* ignorance on this subject ; in direct opposition, not only to probability, but also to those witnesses who swear positively that *John Campbell* made and *confessed*, (respectively,) a promise *before* the marriage.

As to the *secrecy* of old *John Campbell* on this subject, and his executing the writing at the *TREE*, instead of his own house, it is readily accounted for, not only by the condition and circumstances of the witnesses, being labouring men employed at their daily labour, but also by his not wishing, by doing it at his own house, to displease his other children, who seem, in the event, to have taken so warm an interest in opposing the claim of the appellees.

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A great deal has been said tending to impeach the credit of, and impute fraud to *James Campbell* and his two sons. Fraud is never to be presumed, when the conduct in question can otherwise be fairly accounted for. The feelings of a father in behalf of a son supposed to be injured, will go far, even to excuse the part taken by *James Campbell* in this business ; but neither he nor his other sons had any interest in the transaction in question. It was not till after a refusal by *Scott*, on the ground of not wishing to offend *John Campbell's* family, that the brothers of *Andrew Campbell* were called as witnesses to the bond ; and the secrecy of the transaction is justified by the same consideration. As to the AGE of this man, I can only say that much older men than he often retain their intellectual faculties in tolerable vigour ; and as to HIS particular case, an archness and sagacity is discoverable from the circumstances detailed in the testimony, wholly incompatible, as is before said, with the idea of *dotage*.

These deductions have arisen out of a general and comprehensive view of the WHOLE testimony : at the same time it is readily admitted, that particular portions of this testimony might be selected, which, taken *singly*, and being highly coloured, would seem to lead to a different result. It is excuseable in *counsel*, but not in *Judges*, to select and rely on *such parts* of the whole testimony, and such only, as seem to favour the opinions they adopt and maintain.

With respect to the promise or promises made prior to the marriage ; the bill, in the first place, charges such promises to have been made, (but without saying *to whom*,) *before* and *at* (as well as *after*) the time of the marriage : it then goes on to charge a promise made to *Andrew Campbell* *before* the marriage, accompanied with a reference to the will. In the interrogating part of the bill, the defendants are asked whether *John Campbell* did not promise to his *daughter Rebecca* the land in question, and whether he did not *renew* said promise to one or both of the complainants *before* the marriage ? The answer of

John Campbell, in reply, omits to confess or deny a promise made to his daughter, but *denies* having *renewed* the promise before their marriage. This answer is not perfectly satisfactory on this point ; but, inasmuch as the promise to the daughter, if made, was probably *revocable*, and did not necessarily enure to the benefit of her future husband ; the answer ought, probably, to be taken as containing substantially a denial of the promise on which the appellees rely. I am, therefore, willing to give to this answer more credit than the Judge who has just spoken has given it. Having (without any testimony to that effect that I can perceive) inferred that *John Campbell* was in his *dotage* ; and this, although that fact was neither *charged* nor put in issue, that Judge certainly ought not to place much reliance on his answer. We come then to confront that answer with the conflicting testimony : that testimony (if strong enough, under the established doctrines on this subject) is competent to outweigh the answer, as to the fact of the promise having been made ; although that promise may not (*in itself*) confer a right under the act of frauds, unless it be reduced to writing.

Admitting the promise in question to be denied by the answer ; still there can be no doubt but that it is *established* by the testimony. The testimony of *James Campbell*, as to this point, is important. He is the father of one of the appellees, and seems to have taken a warm interest in his son's obtaining redress in this case ; (believing him to have been injured ;) but his competency and credibility are in no way impugned. His declaration, so much vaunted of, respecting his keeping a still, and *John Campbell's* liability to drink, *may* be accounted for on the ground of delicacy, and a wish to avoid censure from a family so hostile to the interests of his son ; and does not necessarily import a *fraudulent* intention, or conduct, on his part : the frankness of the declaration, which he could not but know would be eagerly clutched at, seems to repel such a conclusion. He swears positively that, prior to the marriage, *John Campbell* and *Andrew Campbell* having had a conversation relative

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thereto, "he was called in; and the defendant, (*John Campbell*), then in his presence, gave to *A. Campbell* his hand and promise, that, if he married his daughter *Rebecca*, he should have the plantation he then lived on, "provided he complied with the terms of the will; and "then repeated the contents thereof," &c. I shall presently have occasion to say, that I might, probably, be justified in considering this conversation as amounting *substantially* to a request to marry his daughter: at present, I merely refer to it to shew that a promise is expressly proved, so far as it can be proved by the testimony of one witness. *James Campbell* details, in another part of his deposition, a confession by *John Campbell*, after he had offered the land for sale, which is equally strong to import a promise, and to shew the archness (if not knavery) of the old man: he confessed a promise, by saying that "if he had not done so," (*i. e. promised*), "perhaps he, the complainant, would not have married his daughter;" by saying, "that promises and pye-crusts were made to be broken;" and by telling a story of a man who had married all his daughters by "promising them severally his plantation." The account of this confession is *entirely*, and *almost literally*, corroborated, by the testimony of *John Quinn*, who was then present; and is also confirmed by that of *P. Eagle*, except as to two circumstances which will now be briefly examined. *Eagle* says that *John Campbell*, on being asked several times by *James Campbell*, whether he had not promised the land, said no! This denial, however, was not heard by either of the other two witnesses; and seems to have been afterwards retracted; as it would seem from *John Campbell's* admission, inferable from the before-mentioned maxim respecting promises and pye-crusts, and the story of a man who had married off his daughters; all of which this witness heard from the lips of *John Campbell*. *Eagle* indeed says, *negatively*, that he *does not* recollect having heard *John Campbell* say "if he had not promised his land, perhaps *A. Campbell* would not have married his daughter:" but the force of this *negative* testi-

mony is incompetent to prevail against the *positive* testimony (respecting it) of two witnesses; for the reasons forcibly mentioned by Judge TUCKER, on a similar point, in the case of *Rowton v. Rowton*.^(a) Thus, *Eagle's* testimony seems to be, at least, *neutral* on this subject. It is, therefore, *proved* by two competent witnesses, (in opposition to rather an equivocal answer,) that *John Campbell* confessed, at this time, that he had made the promise before the marriage: it is also proved by *James Campbell* that he HEARD HIM *make it*, as has been before particularly stated.

John Campbell, therefore, made a *promise*, before the marriage, to the purport before mentioned; a *parol* promise, indeed, and therefore not *in itself*, sufficient under our act of frauds. If necessary, I might, perhaps, justly contend that that promise also involved a *request* to marry.

The promise is that, "if *Andrew Campbell* married his daughter, he would give him the land." Now, when a due regard is had to the delicacy of the situation of a father contracting for the marriage of, or requesting another to marry his daughter, it is supposed that this is as literal a request to marry the daughter as can ever be expected, and, therefore, might, perhaps, be considered as amounting, *substantially*, to a request to marry. On this point, however, I am not so sanguine, as on that of the moral duty, arising out of the *parol* promise, to be presently noticed.

A marriage had *on request*, though past, will operate as a consideration to support a future promise.^(b) Nay, it is even held that an *assumpsit* made in consideration that another *had married* my daughter, is binding; for the affection and consideration always continues.^(c) These authorities go to shew, that the promise, (though by *parol*), and the request, if made, (or either of them,) would be a sufficient consideration to sustain a *written* agreement made after the marriage; if it be otherwise sufficient under the act of frauds. It will be coupled and connected with such future agreement, not as a part of the *promise*, (the de-

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(a) 1 Hen. &
Munf. p. 97.

(b) Dyer,
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(c) Cro. Elis.
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claration and terms of which ought to be in writing,) but to shew a CONSIDERATION which will make the *future and WRITTEN promise* valid.

Admitting then this *parol* promise to have amounted to a *request* only, it will (other things conceded) suffice for our purpose. But, considered as a *promise*, it laid the maker under a *moral* obligation, which, although no Court of Law or Equity could enforce, affords a sufficient consideration to *support* a future written agreement.

On this subject, I will beg leave to quote the following passage from the opinion of Lord *Mansfield*, in the case of

(a) *Comp.*
290.

Hawkes v. Saunders : (a) "Where a man is under a legal
"or equitable *obligation* to pay, the law implies a promise,
"though none was ever actually made. *A fortiori*, a legal
"or equitable DUTY is a sufficient *consideration* for an *actual*
"promise. Where a man is under a *moral* obligation
"which no Court of Law or Equity can enforce, and *promises*,
"the honesty and rectitude of the thing is a consideration.
"As, if a man promise to pay a just debt, the recovery of
"which is *barred by the act of limitations* ; or, if a man,
"after he comes of age, promises to pay a meritorious debt
"contracted *during his minority*, but not for necessities ;
"or, if a bankrupt in affluent circumstances, after his cer-
"tificate, promises to pay the whole of his debts ; or, if
"a man promises to pay a *secret trust*, or a trust VOID,
"FOR WANT OF WRITING, BY THE STATUTE OF FRAUDS.
"In such, and many other instances, though the promise
"gives a compulsory remedy, where there was none be-
"fore, either in law or equity ; yet, as the promise is only
"to do *what an honest man ought to do*, the ties of con-
"science upon an upright man are a sufficient considera-
"tion."

This authority is so apposite and conclusive as to the sufficiency of the *parol* promise, viewed merely as a consideration, that I shall forbear to add any thing to it, and proceed to inquire whether the paper of *May 9th*, 1793, is such a writing as, supported by the consideration of the promise aforesaid, stands justified by the act of frauds.

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I will first consider that paper as merely a *written* agreement, this being the strongest ground for the appellants ; and then briefly advert to its effect when considered as a *bond* or *specialty*.

That paper is, *on its face*, a regular bond with a collateral condition. That condition is, that the obligor would abide by the terms of his will, which, however, are somewhat mistaken in the condition of the bond. It gives a right *at law*, either to go for the whole penalty, or for damages, for breaches, even exceeding the penalty, *toties quoties*. In *equity*, it furnishes ground to compel a specific performance, which ground is that stated in the condition. Admitting the sufficiency of the signature, therefore, there is no objection to a specific performance of the covenant stated in the condition ; and it is immaterial, in this point of view, whether it be adjudged a valid *bond*, or merely a *writing* comprising the terms of an agreement respecting the sale of land. The obligor was not only *illiterate*, as he could not *write*, but the persons who filled it up were also *illiterate*, as appears from their inserting the day of the month in a wrong place. Both these results are also justified, by finding, that although a scrawl or seal was annexed by the scrivener at the end of the *condition*, yet *John Campbell* signs, and is permitted to sign his name, at the end of the *penal part* of the bond ; thus withdrawing the paper (as it is now *contended*) from the rank of a *specialty*. These circumstances will have their due weight in forming a construction. The only question is, whether the signature in question extends to and covers the *whole* writing, or only the *penal part* of it. To shew that the *former* was *intended*, it will be seen that the appellant, *John Campbell*, although he denies having "signed a bond *which conveyed the land*," (thereby, possibly, meaning to bottom himself upon the objection arising from his irregular signature now in question,) expressly admits, in his answer, that, at a previous time, he had *agreed* to sign a bond, "*conveying the land to the complainants*," which, however, was ultimately refused, because, as he al-

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leges, *Andrew Campbell* refused to pay the 10*l.* towards his daughter *Hannah*. At that time, therefore, such a *collateral bond* as this was intended, and not a bond for the payment of money only, of which there is no pretence that any was due from *John Campbell* to *Andrew Campbell*. Besides, *Agnes Thompson* tells us, that *John Campbell* left a will with her, whereby to disprove the signature to a certain writing "*conveying his lands to the complainant,*" thereby denying the execution of the bonds in question, but admitting its purport to be, (if executed,) to "*convey the land.*" *James Campbell* swears, that he read over the writing "*here produced,*" (by which I understand the bond, and the whole bond annexed to the bill,) twice to *John Campbell*, who expressed a willingness to sign the same. It is also proved by this witness, that he had frequently heard *John Campbell* say, he intended his plantation for *Rebecca*, and had made his will accordingly, which, indeed, is admitted by the answer; thereby shewing a correspondence of intention, as applying to the respective papers. *Michael Campbell*, a subscribing witness, says, the writing now here produced, dated 9th May, 1793, was presented to *John Campbell* to sign, who said he would sign it, (that is, the whole writing now produced,) if it would do the complainants any good; and which he did sign, being perfectly sober, and not having required it to be read; and this account is essentially supported by the testimony of *James Campbell, jun.* the other subscribing witness. This paper is also always called, and considered as a bond by all the parties; a circumstance inconsistent with the idea of withdrawing the signature from the scroll or seal. A signature, unaccompanied by a seal, does not constitute a bond or specialty.

After all this, can it be said that a *part only* of the bond was executed, from the mere circumstance of misplacing the name of the obligor, by an illiterate man, under the direction of illiterate parties, and thereby not only departing from the uniform intention of both parties, as established

by the testimony, but also saddling *John Campbell* with a debt he never owed or contracted, and which neither party ever dreamt was due or payable? Shall this Court, which regards *substance*, and relieves against mistakes or accidents, be so rigid? It is presumed the bond or writing is good for some purpose; and, is it not better to conform to than violate the intention of the parties? The least, therefore, that we can say respecting this signature, is, that the bond was signed in the *wrong place, by mistake*. This conclusion the testimony fully justifies; but, if it were not through mistake, it arose from a *palpable fraud* in *John Campbell*, possibly under the guidance of those who wished him to evade and defeat the effect of the promises before mentioned. Whether, however, it arose from mistake or fraud, the circumstance ought not to avail him. I should, therefore, rather incline to consider this as a *bond* or specialty; to consider it as if *John Campbell's* name was placed opposite to the *seal*; in which case the *consideration* need not be inquired into. If it be said that this mistake is not *charged* or put in issue, it might be answered, that the instrument is charged and relied on as a *bond*, and that the *intrinsic* circumstances of the case bespeak it to be such. It was, perhaps, unnecessary to resort to testimony *aliunde* on this point, for *res ipsa loquitur*: that testimony, however, as disclosed in the cause, corroborates and confirms this conclusion.

It is not essential to the appellees, however, that this paper should be supported as a *bond*. A *written agreement*, under the statute, is sufficient. As to these, the doctrine of the law is *liberal*. It is held that a signing the name at the *beginning*, as, "*A. B. agrees to sell*," &c. is sufficient, although a place be left for the signature *at the bottom*; and yet, as was held by Lord *Eldon*, it is impossible not to see that the insertion of the name at the beginning, was *not intended* as a signature, and that the paper was *meant to be incomplete*, until it was further signed.^(a) That case is much stronger than the one at bar. In that case, a *further signa-*

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(a) *Sugden's*
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dors, p. 54.

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ture was *intended*; and yet the instrument was held to be sufficient. In this case, the writing was *consummated*, and, under all the circumstances and testimony, is entirely perfect, unless it be defeated by the ignorance, mistake, or fraud of the contracting parties, in relation to the *place* where the name of the obligor is signed.

I consider this writing, then, to be fully sufficient, either as a *bond*, or as a written promise under the act of frauds, the objection of misplacing the signature notwithstanding; and that, as a *writing*, the parol promise comes in aid as an adequate and sufficient consideration. It remains to inquire whether the land shall be decreed to *Andrew Campbell*, in conformity to the terms of the *BOND*, or to his *wife*, as is provided for by the *will*. The writer of the bond was either under the vulgar mistake, that what belongs to the wife belongs to the husband, or had *mistaken* the terms of the will, which had been suppressed, and was withheld by *John Campbell*; but it is evident that the *will* was referred to, and contemplated, as forming the standard, by both parties; and, if (as is established) a writing which does not contain the terms of the agreement, can be *supplied* by reference to another writing which contains them fully, it would seem to follow, that a writing, referring to another, may be *corrected* by the writing referred to.

On this ground, I think the decree of the Chancellor erroneous, so far as it gives the land to the *husband and wife*, and that it ought to be corrected, and the land decreed to the *wife only*. With this variation, the decree is entirely satisfactory to me, on the grounds I have stated, but not precisely on those stated in the decree itself.

Having, throughout this whole case, endeavoured to find out and keep steadily in view the true points, and those only, on which this cause will be found to turn, I have omitted to surcharge myself with adjudged cases, and to puzzle and bewilder my judgment with unsatisfactory, and, perhaps, inconsistent decisions, in relation to the construction, by *English Judges*, upon some questions arising out

of the statute of frauds. As to the promises made before the marriage, I do not contend that THEY will stand the test of that statute ; but the promise made thereafter, (as evidenced by the *bond* or *paper* of May 9th, 1793,) is full up to the requisitions thereof.

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As to the appellant, *Argenbright*, he is a deliberate purchaser, at his own risk, after full notice of the claim in question. It is not *proved*, that the appellees stated to him, or in his hearing, that they relied only on the *bond* ; (whatever he or others may have *understood* on the subject ;) but, if it were so, that bond or writing, either in itself, or as supported by the *consideration* aforesaid, is competent to overreach him.

Judge FLEMING. The principal points in this cause seem to be,

1st. Whether the case be within the statute of frauds and perjuries ?

2d. Whether the paper purporting to be a bond from *John* to *Andrew Campbell*, was or was not, fraudulently obtained ? If not,

3d. What effect it ought to have in the cause ? And,

4th. Whether the appellant, *Argenbright*, had not sufficient notice of the plaintiff's claim, before he purchased the land in question of *John Campbell* ?

Having taken a comprehensive view of the case, it has made a very different impression on my mind from that of the worthy and learned Judge who first delivered his opinion. I agree with him, that there seems to be evident marks of fraud on the face of the transactions ; but they appear to me not to have been on the part of the complainants, but principally on the part of the defendant, *John Campbell*. I shall briefly notice the substance of the bill, the answers, and the evidence in the cause, and must unavoidably travel over some of the ground that has been already taken.

The bill charges, that before, at the time of, and after the marriage of the complainants, the defendant, *John Camp-*

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bell, father of the complainant, *Rebecca*, promised to give her the land in question, (on which he then dwelt,) subject to the payment of 50*l.* to his younger daughter *Hannah*, which the complainants aver they were always ready to do. That before the marriage, in conversation between the complainant, *Andrew*, and the defendant, *John*, about the marriage portion he intended to give his daughter, the said *John* informed the complainant, *Andrew*, of the disposition he intended, and then promised to make, of his land aforesaid; of the will *he had made* to that effect, and that the same was deposited in the hands of his attorney, *Archibald Stuart*, who had drawn the same; and after the marriage referred the complainant to *Stuart* to see the will, and to ask his advice, whether it was sufficient to secure the land to the complainants after the said defendant's death. That *Stuart* answered to his inquiry that the will was sufficient, provided *Campbell* should not revoke it, which he always had power to do. That *J. Campbell* said he honestly intended to fulfil his promise made as aforesaid, and if his will, (which he thought sufficient to convey the land,) was thought insufficient for the purpose, he would execute a conveyance, or give any writing which should be considered so, that would not devert him of the land during his life.

In consequence of which the complainants took advice, and for that purpose had a bond drawn conditioned for conveyance of the same agreeable to his original promise. That the said *J. Campbell* did execute the bond conditioned as aforesaid, and therefore the complainants rested satisfied that, at the death of the said *J. Campbell*, who was upwards of eighty years old, the land would be theirs; and in the mean time, if their circumstances made it necessary, they had the promise of living on the land with the said *John*, whereby there would be, intermediately and finally, a competent provision to support the estate of the matrimony into which the complainants had entered; who were not a little surprised when they understood that *J. Campbell* was about to sell the land to the defendant, *Argenbright*,

who well knew the claim of the complainants before he proposed purchasing.

The complainants took advice ; made known their claim to *Argenbright* ; and published the same in the *Staunton* paper, and recorded the bond in the District Court of *Staunton*. The complainants are informed and believe, that after these steps were taken, the defendants went to the house of the attorney aforesaid, and took up the said will.

That the defendant, *J. Campbell*, sold and conveyed the whole of the land to the said *Argenbright*, and refused to permit the complainants to reside on the same although thereto requested.

This bill states a chain of plain, simple, and to my mind probable facts ; we shall see, by-and-by, how far they are supported by evidence.

The answer of *John Campbell*, appears to be drawn with great professional acuteness ; it is equivocal, elusive, and disingenuous ; and is in substance as follows : That some time before the marriage of the complainants, he made a will, and left the land in question to his daughter *Rebecca*, upon condition of her paying to his daughter *Hannah*, 16*l.* per annum, until 50*l.* should be paid, but never knew that his daughter was going to be married to *Andrew Campbell*, till the day they were married ; and never renewed the promise before their marriage, further than that he had not, as yet, altered his will. That after the marriage, *Andrew* wanted the defendant to sign a bond, a paper that the land was to be the complainants' at the death of the defendant ; and at the time the said bond was to be executed the said *Andrew* was to pay 10*l.* part of 50*l.* to *Hannah* ; but, at the time the said bond was presented, the said *Andrew* refused to pay the said 10*l.* but said he would have all or none ; after which he altered his will, and left his daughter, the complainant, a share, provided she had issue ; otherwise she was to have nothing. He denies remembering that he referred the complainant, *Andrew*, to *Archibald Stuart*, to know whether the will was sufficient to secure the estate to the complainants.

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The first striking impropriety, and evasion in this answer is, that "*the defendant never knew that his daughter was going to be married to Andrew Campbell till the day they were married;*" which strongly implies that he never knew such an event was agreed on, or contemplated by the parties; and this with a view, no doubt, to hold out the idea, that he could not have made the promise charged in the bill, previous to the marriage, when it turns out upon the evidence, and particularly by that of Mr. Scott, the minister who married them, that he was only ignorant of the particular day on which the marriage was to be consummated; for Scott deposed that the marriage was talked of in the neighbourhood previous to its taking place, and thinks they were acquainted with it, but not as to the time, which is proved by other testimony in the cause. But there is still a more obvious evasion in the answer, where the defendant denies that *he* ever signed a bond that conveyed the land aforesaid from him to the complainants. This declaration is not responsive to any part of the bill, in which there is no charge, that he ever did sign such a bond; and seems an artifice to evade answering, whether he did or did not sign the bond charged in the bill; which was a bond conditioned that he *would* convey the land agreeable to his original promise, which I presume, from his evasion, he could not deny; and his not having answered that particular charge, seems to imply an acknowledgment that he did sign that charged in the bill; but however that may be, the fact is proved by two subscribing witnesses.

He does not positively deny having referred the complainant, *Andrew*, to *Archibald Stuart*, to know whether the *will* was not sufficient to secure land to the complainants, but says, "he does not remember to have done so;" but it is proved by the deposition of *James Campbell*, of whose credibility I shall speak hereafter.

The answer of *Argenbright* denies any knowledge of a contract between the complainants and the other defendant for the land in question, either before or after the marriage, but says he understood that *Andrew Campbell* claimed

altogether under the bond, and *will*, alluded to in the bill. He got a sight of the bond and was advised, that he might safely purchase. The remaining part of the answer consists chiefly in what he heard the other defendant, *John Campbell*, say, to whom he gave the full value of the land in question.

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In considering the evidence, which is voluminous, and in some instances seemingly contradictory, I shall first notice the answer of *John Campbell*, so far as it tends to support the principal charges in the *bill*. He acknowledges that some time before the marriage, *he* made a will, and left the land in question to his daughter *Rebecca*, upon condition that *she* should pay his daughter *Hannah*, 10*l.* per annum, until 50*l.* should be paid, and that *he* did not alter his *will* until after the marriage was consummated; that after the marriage, *Andrew* wanted him to sign a *bond* or *paper*, that the land was to be the complainant's at his death; and at the time the said bond was to be executed, the said *Andrew* was to pay 10*l.* part of 50*l.* to *Hannah*, but at the time the said bond was presented, *Andrew* refused to pay the 10*l.* but said *he* would have *all* or *none*; after which the defendant altered his will. This confession in the answer strongly corroborates, and to my mind, gives additional force and credence to the testimony of *James Campbell* and others, in favour of the appellees; and it may be here remarked, that by the will, which the defendant, *John Campbell*, confesses *he* had made in favour of his daughter *Rebecca*, previous to the marriage, she was to pay nothing to *Hannah*, until after the death of the testator, as she could take nothing by the devise, before that event should happen; and although a will is revocable, at any time during the life of the testator, yet, as the will in question was *completely executed*, and the contents held out to *Andrew Campbell*, by the testator, as an inducement to him to marry his daughter, I think it takes the case out of the statute of frauds and perjuries, so far at least as to let in all the oral testimony in the cause. The evidence of *Jame*

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Campbell is further strengthened by the testimony of *Jane Smith* and *Hannah Campbell*, two of the defendant's witnesses, who are daughters of the defendant, *John Campbell*.

Jane Smith, on being interrogated, says, that she heard her father say words to this amount ; " that he, *Andrew Campbell*, was welcome to come and live with him," and that he appeared to be satisfied with the parties after the marriage. And *Hannah Campbell*, on being interrogated, says that she, at *different times*, heard her father say, that he intended to give the plantation he then *lived on to Andrew Campbell after he was married to her sister*.

This evidence then of the defendant's witnesses, so perfectly coincides with the testimony of *James Campbell*, and is so consistent with what *John Campbell* himself confesses were once his intentions, that I cannot but give full credence to the whole of his deposition ; and though it appears from other testimony, that on one or two occasions, he shewed uncommon warmth in the business, it might well arise from a conviction that they were about to do great injustice to the complainants.

James Campbell, senior, then clearly proves to my satisfaction, the solemn promise made by *John Campbell* to *Andrew Campbell*, that if he married his daughter *Rebecca*, he should have the plantation he then lived on, provided he complied with the terms of the *will*, which he repeated, and were, that he should pay 10*l.* per annum to his daughter *Hannah*, until 50*l.* should be paid, which is precisely what *J. Campbell* himself confesses, in his answer, was the substance of the will he made previous to the marriage, which I doubt not was a principal *inducement* for *Andrew* to marry his daughter ; and as such was by him held out to the said *Andrew* with that particular view.

That after the marriage took effect the promise was repeated by *J. Campbell*, with this natural and striking circumstance, that he asked the complainant to go with him to plant *fruit trees* which he said were for *himself*, and which the deponent understood was done by the said *Andrew*.

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That after the marriage, and for the purpose of securing the land to the complainants, the defendant, *John*, agreed to enter into a writing, and one was drawn, (which is now here produced,) and read over twice to the defendant, who expressed a willingness to sign the same ; but the deponent would not agree it should be signed at his house, lest it should be said that (as the old man was subject to drink, and the deponent kept a still) an advantage had been taken of him. That he continued willing to sign the bond, until he visited *Samuel Henry*, and some of his friends, after which he said he had altered his will, and that his said friends had advised him to do so, although it was against his will.

The deponent afterwards asked the defendant, *John*, why he made the promise if he did not intend to comply with it? to which he answered, "*if he had not done so, perhaps the complainant would not have married his daughter, and that promises and pye-crusts were made to be broken;*" and told a story of a man "having married all his daughters, by promising them severally his plantation, and that the last had taken him in by obtaining a writing as the complainant was now going to do."

John Quinn deposeth the same as the latter part of *James Campbell's* deposition, and particularly that in answer to *James's* question, *why he made the promise if he did not intend to comply with it*, he said that promises and pye-crusts were made to be broken ; and also said, *if I had not promised him the land, perhaps he would not have married my daughter* ; and then went on to repeat a story of a man's marrying his daughters by promising his plantation.

To lessen the force of this testimony the defendants rely on the deposition of *Peter Eagle*, who says he was present at the time when *John Campbell* asked *Andrew* why he had forbid the sale of his land, to which *Andrew* replied, he had a right to do so, as he was about to sell it ; which was followed by a conversation of some length, till *James Campbell* came in, and asked the said *John*, if he had not promised the said *Andrew* the land ? To which he replied,

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no : and, after being much teased, at length replied, "promises and pye-crusts were made to be broken," and then told a story (as mentioned in the depositions of *Quinn* and *James Campbell*) of a man who married several daughters by promising them his plantation, the particulars of which he does not recollect : but remembers to have heard among the neighbours that *Rebecca* was to have the plantation ; but does not remember to have heard the defendant, *John*, speak upon that subject, before the conversation above stated.

This deposition of *Peter Eagle*, relied on by the defendants to lessen the force of *Quinn's* and *James Campbell's* testimony, seems to me to corroborate, and give additional credit to it.

In the deposition of *Alexander Thomson*, (another of the defendant's witnesses,) we have a key to *John Campbell's* motive for altering his will though the witness is not positive in any part of his testimony. He says that he formerly wrote three wills for the defendant, *John*, none of which agreed in their contents ; that he saw, he thinks the will drawn by *Stuart*, but remembers not its contents ; but recollects that he advised him to alter it, observing, that if he fulfilled it, he would, before a year, be on the parish, upon which he thinks he said he would have it altered. He thinks he wrote a will since the one written by *Archibald Stuart*, which altered said will, and did not leave the land to the complainant, *Rebecca*.

This idea held out by the witness to *John Campbell*, that, if he fulfilled the will written by *Stuart*, he would be on the parish before a year, seems a mere bugbear held out to frighten him, as the will could have no effect during the life of the testator ; but it appears to have answered the purpose of the adviser.

2. As to the second point, whether the bond or writing in question was fraudulently obtained, I must notice, that although he had, after having agreed to sign it on its being twice read to him, afterwards refused, for reasons before stated, he at length retracted his former refusal, and did

sign it in presence of two witnesses, who both declare that he was duly sober at the time ; and this, it appears to me, he was bound in *conscience* to do, being in conformity to a promise before solemnly made. As to the time and place of its having been done, I think it immaterial, nor do I think that the circumstance of the instrument's being witnessed by the brothers of *Andrew Campbell*, lessens at all the authenticity of it, as they probably were the most convenient witnesses, and there is no impeachment of the credit or veracity of either of them.

3. With respect to the effect the instrument of writing ought to have in the cause, it is laid down in the case of *Mountague v. Maxwell*, 1 *Strange*, 237. that a parol promise on marriage is not *alone* sufficient to charge a party making the promise, yet it is a good consideration to support a settlement made agreeable to it, after marriage ; and so it was decided in the case of *Robinson v. Brock*, in this Court.(a) And Lord *Mansfield*, in giving his opinion in the case of *Hawkes et ux. v. Saunders*,(b) laid it down as a sound general principle, that, where a man is under a *moral obligation* which no Court of *Law* or *Equity* can enforce, and *promises*, the honesty and rectitude of the thing is a consideration ; and stated several cases to elucidate the doctrine ; and one of them was, where a man promises to perform a *secret trust*, or a *trust void for want of writing*, by the statute of frauds. Though I do not consider the case before us as standing on a bare parol promise before marriage ; for I cannot lose sight of the *will* of the defendant *Campbell*, which in his answer he confesses he had made previous to the alleged promise ; and which it is in evidence, he particularly referred to at the time of making the promise ; (holding it out as an inducement to the marriage ;) and, though it had been made some time before, and was then in the keeping of Mr. *Stuart*, his attorney, I view it in the same light, and think it ought to have the same effect as if he had held it in his hand, and had read it to the complainant, *Andrew Campbell*, and must operate at least as a *memorandum* or *note in writing signed by the*

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(a) 1 *Hen. & Munf.* 212.
(b) *Corp.* 290.

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party charged, of sufficient validity to take the case out of the statute of frauds and perjuries.

But it is objected, 1st. That the instrument is not agreeable to the promise charged in the bill, even with the defeasance at the latter end of it; because the promise (if made at all) was to give the land to his daughter *Rebecca*, and the defeasance in the writing states, that *J. Campbell* had by his will bequeathed the land to the said *Andrew* and his heirs; 2d. That, at most, it can operate against *John Campbell*, but as a simple promissory note, unconnected with the latter part of the instrument, he having signed the obligatory part of it only. With respect to the first objection, the variance seems to have arisen not from an intention of fraud, but from a mistake either in *Andrew*, or in the person who drafted the instrument, with respect to his interest in the lands devised to his wife, supposing it to have been the same as if it had been personal property: and the mistake lies only in the *recitals* as it goes on to refer to the *will* which *John Campbell* was not to alter or change, so far as it related to the land in question; by referring to which, as stated by *John* himself in his answer, the true intention of the parties may be fully understood.

As to the other objection, I consider the instrument of writing as one *entire* thing, and not to be taken separately; and, though it is unskillfully drawn, and informal, yet it seems to me it sufficiently states the intention of the parties to give it validity; and the style, or form, in which the obligatory part is written, shews that it was intended to operate as a bond, with a condition or defeasance, and *not* as a simple promissory note.

As to the part of the paper on which the obligor signed his name, I think that immaterial; he signed and delivered it as his *act* and *deed*; and that I think sufficient to bind him in *equity*, notwithstanding its informality.

As to the fourth point, it appears to me that the appellant *Argenbright* had sufficient notice of the claim of the appellees before his purchase; he, therefore, made it at his peril, and must abide the consequences.

I am of opinion, however, that the Superior Court of Chancery erred in decreeing the conveyance from the appellant *Argenbright*, to be made to the appellees *jointly*, when it ought to be made to the appellee *Rebecca only*, agreeably with the original intention and promise of her late father *John Campbell*, now deceased ; but that the decree is correct, and ought to be affirmed in all its other parts.

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v.
Campbell and
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*Tomlinson against Dilliard ; and
Mackey against Bell.*

Friday, No-
vember 11th.
and
Tuesday, No-
vember 15th.

HAY and *Wickham*, for the appellees, (at the request of the Court, for the purpose of having certain questions settled on which there was a difference of opinion among the Judges,) moved to dismiss these two appeals, (from the Superior Court of Chancery for the *Richmond* District,) as having been improvidently awarded ; the first by the Court of Appeals, and the second by one of its Judges out of Court ; in both instances, after the vacation next after the term in which the decree was rendered had elapsed.

Prior to the act of 1807, the Court of Appeals had power to grant appeals from, or writs of *supersedeas* to decrees of the several Superior Courts of Chancery, at any time within three years after the same were pronounced ; and, since the said act, any Judge of the Court of Appeals, out of Court, has the same power.

Randolph, contra, observed, that it had been the uniform practice since the year 1792, to grant appeals in such cases ; and immense injury to individuals would result from changing it. By the 18th section of the law concerning the High Court of Chancery, (a) *the said Court*, or the Judges thereof in vacation, was empowered to allow an appeal from the decree of a County Court, at any time within three years after its date ; and the 14th section of the Court of Appeals law, (b) by plain and evident implication confers a similar power on this Court to grant appeals from decrees of the High Court of Chancery. The 59th section of the first mentioned act (c) cannot be considered as repealing the 18th ; because there is no absolute repugnancy

(a) *Rev. Code*, 1 vol. c. 64. p. 65.

(b) *Rev. Code*, 1 vol. c. 63. p. 62.

(c) *Id.* p. 68.

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Abr. Civil. ed.
373. tit. Sta-
tute.

between them, and the law does not favour repeals by im-
plication.(a)

Saturday, November 19. The Judges pronounced their
opinions.

In the case of TOMLINSON v. DILLIARD, the following
was the opinion of

Judge TUCKER. Mr. Hay moved to dismiss the ap-
peal in this case, as being improvidently granted by this
Court, after the expiration of the vacation next after the
term in which the decree was rendered. This will require
a review of the several acts passed on the subject of ap-
peals at different periods.

The Committee of Revisors, in 1792, reported to the Ge-
neral Assembly two bills among others ; the first for re-
ducing into one act the several acts concerning the Court
of Appeals ; the second, those concerning the Court of
Chancery. (Revisal of 1792, c. 63. and c. 64.) The
former passed the 26th day of October, 1792 ; and, in the
14th section (in which the 12th section of the act of 1788,
c. 68. is incorporated) declares, " that appeals, writs of
" error, and *supersedeas*, may be granted, heard, and de-
" termined by the COURT of Appeals, to and from any final
" decree or judgment of the High Court of Chancery, Ge-
" neral Court, and District Courts, in the same manner
" and on the same principles as appeals, writs of error, and
" *supersedeas*, are to be granted, heard, and determined
" by the High Court of Chancery, and District Courts, to
" and from any final judgment or decree of a County
" Court ; and the party shall proceed in like manner."

The act of May, 1788, c. 7. had declared " that any
" party thinking himself aggrieved by the decree of a
" County Court in Chancery, and not having entered an
" appeal from the decree at the time it was pronounced,
" might appeal from such decree at any time within one
" month after the decree pronounced, lodging for that pur-
" pose with the Clerk of the High Court of Chancery a copy

"of the proceedings in the suit, and a petition, suggesting
"error in the decree, signed by some counsel attending
"the High Court of Chancery, and also lodging with the
"petition an appeal-bond, &c. And the Clerk shall there-
"upon issue a summons," &c. This clause was inserted
in the Chancery law, sect. 16.

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The act of 1787, c. 9. declares, "that the High Court
"of Chancery, or any JUDGE thereof, OUT of term time,
"shall have power *for good cause shewn*, to allow a petition
"of appeal, and if necessary, order a *supersedeas* to stop
"the execution of any decree pronounced by an inferior
"Court, at any time within three years after pronouncing
"the same; the party praying such appeal complying with
"the terms which the Court or Judge shall annex to such
"order." The same act declares that whenever an appeal
is prayed for from any inferior Court, or bond is given for
the removal of any suit in Chancery, in any manner what-
soever, it shall be sufficient if the bond be executed by good
and sufficient securities, although the appellant, or party,
shall not execute it. These provisions were inserted in the
bill which the Committee of Revisors had prepared and
laid before the General Assembly, and will be found, sect.
16, 17, 18. of the act reducing into one the several acts
concerning the High Court of Chancery. Ed. 1794.
c. 64.

Had the bill passed in the same form that it was prepar-
ed, no doubt, perhaps, would have been entertained upon the
subject. But after the Legislature had finally disposed of
the act concerning the Court of Appeals, which passed as
before noticed, on the 26th of *October*, they seem to have
taken up the act concerning the High Court of Chancery,
the final passage of which is noticed as of the 29th of *No-
vember* following. In that act, after having probably ap-
proved of the rules contained in the 16th, 17th, and 18th
sections, as applicable to appeals from the INFERIOR to the
Superior Court of Chancery, and, after going through the

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whole bill reported by the Committee of Revisors, they appear to have thought it necessary to provide for two particular cases, for which there was either no provision, or not such as the Legislature on more mature consideration approved of; and accordingly added the 59th and 60th sections of the bill; the former relative to appeals FROM the High Court of Chancery; the latter relative to bills of review. It is remarkable that the provisions in both these clauses are introduced with a preamble indicative of the intention of the Legislature to give to both subjects a due consideration and to provide for them accordingly.

The former recites, (sect. 59.) "whereas many persons "against whom decrees may have been rendered in the High "Court of Chancery, may desire to appeal from such decrees, but have been hindered from doing so, at the term "in which the said decrees were pronounced, Be it enacted, that if upon a petition to any Judge of the Court of "Appeals, or the Judge of the High Court of Chancery in "VACATION NEXT after the TERM *when such decree shall have been rendered* for relief, in such a case, it shall appear to his satisfaction, that the failure to appeal from "his decree at the time, or during the term when it was "pronounced, did not arise from any *culpable neglect* in the "petitioner, or that, *upon the* WHOLE CIRCUMSTANCES OF "THE CASE, the petitioner ought to have the *benefit of an appeal*, it shall be lawful for the said Judge to grant the "said appeal," &c.

This section appears to me as fully to embrace, and provide for the *time, manner, terms, and conditions* upon which appeals might be granted FROM the High Court of Chancery to the Court of Appeals, by any JUDGE of this Court, or any JUDGE of the High Court of Chancery in VACATION, as the 18th section embraces and provides for the granting of an appeal by the JUDGE of the High Court of Chancery in VACATION, to any decree of an INFERIOR Court. Nor can I discover any difference whatsoever in the interpretation of the words "*for good cause shewn*," in the former section, and those used in the latter, "*upon the*

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"WHOLE CIRCUMSTANCES of the case." To my apprehension, they import precisely the same thing, and, of course, ought to receive the same construction; the FIRST as applicable to the decrees of COUNTY Courts, of which the Legislature were then speaking, in sect. 18th; the second as applicable to those of the HIGH COURT of Chancery, of which they meant to speak in the 59th section. There is, therefore, no necessity to turn back to the 18th section to know what the Legislature meant when they added the 59th section, as to that particular; but, with respect to the power of the COURT to allow a petition of appeal, at any time within *three years*, the 59th section is altogether SILENT. The 18th section, then, may receive a construction totally independent of, and unconnected with the 59th section, as far as relates to the power of the COURT *in term time*; although we must resort to the latter, to determine the power of the JUDGES *in VACATION*.

THAT case is NOT NOW BEFORE US; and EXTRAJUDICIAL OPINIONS have GENERALLY been deemed improper in this Court. I shall, therefore, confine my opinion at PRESENT, to the case BEFORE US. And, in doing so, I have no hesitation in deciding that the COURT *had power* to allow the appeal in this case, at the time it was allowed. In this case the decree was pronounced *July 26, 1803*, and the petition of appeal was allowed by the Court of Appeals, in COURT, *November 10, 1803*. The act of 1806, c. 22. declaring that no appeal, writ of error, or *supersedeas*, shall be granted by the Court of Appeals in COURT, did not pass till three years afterwards: and consequently, the motion to dismiss it, as improvidently granted, ought to be overruled.

Judge ROANE. By the 14th section of the act constituting the Court of Appeals, (a) it is provided, that "*appeals, writs of error, and supersedeas, may be granted, heard, and determined, by the Court of Appeals, to and from any final decree or judgment of the High Court of Chancery, General Court, and District Courts, in the same*

(a) *Rev.*
Code, 1 vol.
p. 62.

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"manner, and on the same principles, as *appeals, writs of error, and supersedeas*, are to be granted, heard, and determined, by the High Court of Chancery, and District Courts, to and from any final decree or judgment of a County, City, or Borough Court; and the party shall proceed in like manner, and the damages, in case of affirmance, shall be the same in the Court of Appeals, as in those Courts respectively:" and in the case of *Gaskins v. The Commonwealth*,^(a) these words "*in the same manner, and on the same principles*," were construed by this Court to embrace *the period of limitation*, provided for suing out writs of *supersedeas*, to the judgments of District Courts, and to adopt it in relation to judgments rendered in the General Court. If, therefore, the 18th section of the act constituting the High Court of Chancery, ^(b) is still in force, the limitation of three years, allowed to that Court, for granting appeals from the judgments of the inferior Courts, is, by this decision, made to apply to the grant of appeals from the decrees of that Court, by the Court of Appeals. It remains to inquire whether that section of the Chancery law is in force or not.

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(a) 1 *Call*,
Code, 1 vol.
p. 65.

The act constituting the Court of Appeals passed on, and was in force from, the *twenty-sixth of October, 1792*; whereas the act concerning the High Court of Chancery did not pass, nor commence its operation, until the *twenty-ninth of November, 1792*: and it is said that the 18th section only was reported to the Legislature by the Committee of Revisors, but that the 59th was then enacted for the first time. However it may be as to this *report*, respecting which the people of the Commonwealth know nothing, it not being published and promulgated for their information; it is clear that the provision contained in the 18th section was the *then existing law*, (*i. e.* on the 26th of *October, 1792*,) it having been enacted in 1787, c. 9. sect. 2. If any inference therefore is to be drawn from the circumstance that the law concerning the Court of Appeals was passed some days before the other; it would rather be that the 18th section was only *referred to and adopted by it*, than the converse;

as that section embraced a then existing provision, whereas the 59th section was at that time *in nubibus*. But a construction going to *reject* the 59th sect. has never entered the head of any person ; and the contrary I understand to be admitted by the judge who has preceded me. Whatever the construction might have been, had the 14th section of the Court of Appeals' law tied the case down to the *manner and principles* THEN EXISTING in relation to appeals granted by the Court of Chancery, the construction in this instance is left exceedingly clear, not only by the general principle operating in such cases, but by the very terms of the act. That general principle is that the *accessory* follows the nature of the *principal* ; and being generally referred to it for the standard of regulations and principles, will abide such changes and modifications as may thereafter be attached to it. The *terms of the act*, which seem to come in aid of this general principle, are, that appeals shall be granted by this Court in the same manner, &c. as appeals, writs of *error*, &c. are TO BE granted, heard and determined by the High Court of Chancery ; thus expressly extending to the cases of prospective and subsequent alterations.

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As to the question whether the 18th section of the law aforesaid is repealed by the 59th section, I will premise that that construction is equally inconsistent with the RULE (for construing statutes) that the *former* statute, or the *former part* of the same statute is only so far repealed as it is *repugnant* to the latter, and with the general and just provision in all our acts, allowing a right of appeal for cause of error during a much longer time than that provided by this 59th section. The 18th section allows an *appeal for good cause*, at any time within three years : but the 59th section (recognising and enlarging the right to *appeal as of course*) provides for cases where an appeal, *on this ground*, has not been prayed during the term in which the decree was pronounced, where it shall appear that the failure to appeal at the time was not owing to any culpable neglect of the petitioner. Nothing could be more *just* than this provision, as, without it, the right to *appeal (as of course)*

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would be lost to all persons not *actually attending* the Court, or who had not foreseen that the decrees would be against them, and previously instructed their counsel on the subject. It must not be lost sight of, that confining the right to appeal to the next vacation only, would, considering the *shortness* of some of the vacations, and remote residence of many of our citizens, operate a denial of the right altogether, (however *erroneous* decrees may be,) except where the suitors are actually attending, or their counsel may have been instructed as aforesaid ! As to this additional provision in the 59th section, that an appeal may be also granted where "upon the whole circumstances of the case," it appears that one ought to be allowed ;—that was, perhaps, tautologous, and followed, *a fortiori*, from the preceding provision ; but was not meant to supersede or repeal the foregoing provision contained in the 18th section.

This construction of the act has uniformly obtained, ever since its passage in 1792. It has obtained the sanction of every Judge who has sat in this Court, since that time ; the Judge who preceded me, it seems, not excepted ; and although no solemn discussion was deemed necessary until the present time, it was because no doubt was ever suggested. It is within my knowledge that the point was at different times *considered* by the *Judges*, and even by the *Court*, who have granted *very many* appeals after the lapse of the ensuing vacation, as appears by a list furnished by the Clerk and now before me. The point therefore, of the construction of the act is equally clear in itself, and concluded by a long series of decisions upon the subject.

Thus stands the case, independently of the act of *January*, 1807, c. 22. The object of that act was to expedite the progress of the docket of the Court of Appeals. This is evident not only from its abolishing appeals on forthcoming bonds, but also for its transferring from the *Court* to the *Judges*, in vacation, or in term time, the power of granting appeals ; the discussions concerning which, had probably exhausted much of the time of the Court. Its *object* was not to diminish or abridge the right

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of appeal, except in the beforementioned instance ; under the influence of the maxim that the exception proves the rule. Such could not have been the *object* of the Legislature, in the degree now contended for, without not only departing from the general system of our laws as aforesaid in relation to the right of appeal, but also abridging very much the utility of this Court. Let us then see what are the *words* of the act on the subject. The words are that appeals, &c. shall not be hereafter granted by the *Court of Appeals*, but by the *Judges*, or any one of them, either in vacation, or in term time, “ under the *regulations* heretofore prescribed “ by law.” When a power is transferred from one tribunal to another, it would seem naturally to follow that the *regulations* under which the *former* acted would be transferred to the *latter* : but the Legislature not satisfied to let it rest on this general principle, have made an express provision on the subject. This term *regulations* would seem fully as competent to embrace the *term of limitation* on this subject, as was the expression, in the act before mentioned, on which the decision in *Gaskins v. The Commonwealth* was founded.

It is said that the *regulations* here intended are such as appertain only to appeals as heretofore grantable by the *Judges* ; or, in other words, only embrace the period of time prescribed by the 59th section, which relates to a grant of appeals by the individual Judges. The answer is, that, in that point of view, the provision is superfluous ; nothing being more clear than that the *regulations* under which the Judges act in relation to granting appeals would *ipso facto* extend to any new class of appeals which might be added to the jurisdiction heretofore exercised by them upon the subject.

In every light in which I can view this subject, I have not a particle of doubt but that we ought to overrule the motion in both cases,

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Judge FLEMING was of the same opinion with Judge
ROANE.

It was therefore unanimously decided that this appeal was not improvidently awarded, and that the motion be overruled.

In the case of *Mackey v. Bell*, the following opinion was delivered by Judge TUCKER.

This was an appeal from the *Richmond* Chancery Court. Mr. *Hay* moved to dismiss the appeal in this case, as having been improvidently granted by *one of the Judges* of this Court, after the expiration of the vacation *next after* the term in which the decree was rendered. It differs from the case of *Tomlinson v. Dilliard* in this; that that appeal was granted by the *Court*, this, by one of the Judges *OUT OF COURT*.

In the review of the several acts of the Legislature upon the subject of appeals to this Court, which I took in the case of *Tomlinson v. Dilliard*, I have anticipated much that I should have had occasion to say in this case. I beg leave therefore to refer to what I then said, as constituting the foundation of my present opinion.

Had the revisal in 1792 never taken place, or been made, the laws passed antecedent thereto would have given the rule in all these cases.

The act of *May, 1778*, allows an appeal from the decree of a County or other inferior Court, at the DISCRETION of the PARTY, within ONE MONTH after the decree was pronounced. It could not be prevented or denied, if he complied with the requisitions of the law. This provision was consolidated in the 16th section of the act concerning the High Court of Chancery, and though it mentioned appeals from the County Courts only, it might, perhaps, have applied to those from the *High Court* of Chancery under the act of 1788, c. 68. consolidated in the 14th section of the

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act concerning the Court of Appeals ; but this point is not now before us, and I mean not to give any opinion upon it.

The act of 1787, c. 9. consolidated in the 18th section of the act of 1792, concerning the High Court of Chancery, allowed an appeal from any inferior Court to be granted by the HIGH COURT of *Chancery*, or the *Judge* thereof in vacation, FOR GOOD CAUSE SHEWN at any time within three years after the decree should be pronounced. And by the operation of the act of 1788, c. 68. consolidated in the 14th section of the act concerning the Court of Appeals, THIS COURT was invested with the same power of granting appeals, for the same space of time, to the decrees of the High Court of Chancery. But although this is very clear as to the power of the COURT, there is great room to doubt whether any power was, even by *implication*, given to the JUDGES of this Court, as JUDGES OUT of Court. For the words of the 14th section of the Court of Appeals' law, are, " appeals, writs of error, and supersedeas, may be " granted, heard and determined, BY THE COURT of AP- " PEALS ; (not mentioning or referring to the Judges indi- " vidually ;") so that the true construction seems to be, that the Court might grant appeals, the Court might grant writs of error, or the Court might grant writs of *supersedeas*, upon the same principles and in the same manner, as appeals, &c. might be granted by the High Court of Chancery, or by any District Court of Common Law, and I incline very strongly to the latter construction. And I think the decision of this Court, in the case of *The College v. Lee's Executors*, strongly in favour of this construction. The act for enlarging the right of appeals in certain cases had declared that it should be lawful, for the High Court of Chancery, upon any interlocutory decree, in its discretion to grant an appeal to this Court. But although that Court consisted only of *one* Judge, whose *discretion* might be presumed to be the *same* OUT of Court as IN Court ; yet this Court decided he could only exercise that discretion, under the law, in Court ; and dismissed the appeal. The

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case seems much stronger where the Court consists of a plurality of Judges.

But, (be this last point as it may,) as I have observed in the former case, when the Legislature had gone through all the laws consolidated in the act concerning the Court of Appeals, and passed that act; they took up the act concerning the High Court of Chancery; and approving of all the provisions contained in the 16th, 17th, and 18th sections, as applicable to the COUNTY COURTS, but probably not wholly approving of them as applicable to the decrees made by the HIGH COURT of CHANCERY, they introduced an entire new clause, section 59. by which leaving the power of the COURT as it stood under the operation of the 14th section of the Court of Appeals' act, upon the 18th section of the Chancery act, they granted a *new* power to the JUDGE of the High Court of CHANCERY, and restrained the power of the Judges of this Court to grant an Appeal, to the VACATION NEXT *after the term* when the decree should be pronounced, instead of allowing them to exercise that power, as the COURT might, at any time within three years; if, indeed, they were ever invested with such a power, which I think they had not. Here we find a new power given to one Judge; and a former power, which by *implication* and *construction* ONLY may be supposed to have been given to *other* Judges, clearly *defined* and *limited* to a shorter time than it had been before extended to.

The maxim that *legis posterius priores contrarias abrogant*, leads us to say, that so much of the 14th section of the act concerning the Court of Appeals, by which a general reference is made to the laws *before* that time passed on the subject of appeals from the COUNTY COURTS as may be contrary to the EXPRESS SUBSEQUENT provision contained in the 59th section of the Chancery law, was thereby repealed. We are told that if a former act says that a Juror upon such a trial shall have twenty *pounds* by the *year*; and a new statute afterwards enacts that he shall have twenty marks, (which were but 13*l.* 6*s.* 8*d.*) here the latter statute, though it does not *express*, yet necessarily *implies* a NEGA-

TIVE, and virtually *repeals* the former. 1 *Black. Com.* 89. So here, when the clause respecting COUNTY COURTS, was by *implication* and *construction* extended to the High Court of Chancery, and to the Judges of this Court, as well as the COURT itself, under former laws, to THREE YEARS from the time of passing the decree; yet, when the Legislature thought proper to add another clause, *expressly* declaring that the JUDGES of the High Court of Chancery, and of this Court, might grant an appeal during *the vacation next after the term* when the decree shall have been pronounced, this latter clause contains such a *negative* to the *former* power of the Judges, as to my apprehension is perfectly parallel to the case put by Judge *Blackstone* above.

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Statutes in *pari materia* ought certainly to be construed together; but certainly not so that a construction, arising from *implication* only, from that which is contained in a *former* law, shall *overrule* the *express* words which the Legislature have used in a *later* statute, and upon the very point in controversy.

We come now to consider the act of 1806, c. 22. sect. 4. which enacts, that no appeal from any decree pronounced in any of the Superior Courts of Chancery, nor any writ of error or *supersedas*, shall hereafter be granted by the Court of Appeals in Court; but the Judges, or any one of them, either in *vacation*, or *during the terms* of the said Court, shall have power to grant any such appeal, &c. UNDER the REGULATIONS HERETOFORE PRESCRIBED BY LAW. What were those regulations? The SAME that are contained in the 59th section, by which, and by which only, the Judges INDIVIDUALLY, were authorised to grant any such appeal. That is to say, *during the vacation NEXT AFTER* the term when the decree shall have been pronounced. The words "*either in vacation or during the terms* of the said Court," do not, in my opinion, enlarge the powers of the Judges beyond what they were before invested with, but were probably meant to remove any doubt that might arise, as to the exercise of the power before given them, *during the term*, since

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the right of the COURT during that period was expressly taken away.

The cases of *M'Call v. Peachey*, (1 *Call*, 55.) *Bedinger v. The Commonwealth*, October term, 1803, (3 *Call*, 461.) *Warrens v. The Commonwealth*, and *Stras v. The Commonwealth*, both upon writs of *supersedeas*, granted to judgments of the District Courts in criminal cases, May 2, 1805; *Bowyer v. Lewis*, (1 *Hen. & Munf.* 563.) *The College v. Lee's Executors*, (2 *Hen. & Munf.* 557.) in which the appeal was dismissed after a decree of reversal had been pronounced by this Court, and perhaps some others might be adduced to shew that this Court, on former occasions, has not been so tenacious either of its jurisdiction, or even of its opinions, as to consider them, like the laws of the *Medes* and *Persians*, irrevocable and unchangeable. Whoever compares the cases of *Jones v. The Commonwealth* (1 *Call*, 555.) with that of *Bedinger v. The Commonwealth*, (3 *Call*, 461.) will readily discover in the latter, that however this Court may have mistaken its jurisdiction on the former occasion, it was ready to relinquish it on the latter.

For these reasons I am of opinion the appeal ought to be dismissed as improvidently granted.

Judge ROANE was of a different opinion, for the reasons assigned by him in the case of *Tomlinson v. Dilliard*.

Judge FLEMING. The only question before the Court in this case is, whether a Judge of the Court of Appeals may, for good cause shewn, lawfully allow an appeal from a decree of a Superior Court of Chancery, and, if necessary, order a *supersedeas* to stop execution thereof, at any time, within *three years* after pronouncing the same.

Soon after the declaration of *American* independence, the primary object of the Legislature of *Virginia* was to form a system of jurisprudence, for the due administration of justice, adapted to the principles of a republican constitution, which occasioned a material variation from the system existing under the *regal* government.

It was found expedient to constitute and establish several Courts in regular gradation from the lowest to the Supreme Court of Appeals ; the lower order of which are the County and Corporation Courts, having within their respective precincts, both Common Law and Chancery jurisdiction. The next in order was the General Court, having general and superior jurisdiction in cases at common law ; and then followed the High Court of Chancery, with general and superior jurisdiction in all cases of equity. Appeals from the County and Corporation Courts at common law lay to the General Court ; and in cases of equity, to the High Court of Chancery ; and from either and both of those Courts, to the Supreme Court of Appeals. The business, however, having accumulated in the General Court in an extraordinary degree, the Legislature, in the year 1788, thought proper to divide the State into eighteen distinct Districts, establishing a Court of Common Law in each, with the same jurisdiction within its respective District as the General Court possessed and exercised, allowing appeals from the inferior Courts of Common Law, in the same manner and on the same principles as they were formerly allowed throughout the State to the General Court.

In the year 1792, the several acts of Assembly (and particularly those respecting the administration of justice) were, by a Committee of Revisal, in a great measure condensed, and brought nearer one point of view. On the report of the Committee, the Legislature passed them (with some small alterations or additions) as they now appear in our statute-book, so far as they seem to affect the question now under discussion ; in deciding which, I shall consider them taken altogether as one act passed on the same day, and forming a general system of jurisprudence ; and as I deem the right of *appeal* from an inferior to a superior tribunal one of the most beneficial and desirable privileges we can enjoy ; and in which every individual citizen may, at one time or other, be interested, I must give to every act and clause on the subject of *appeals* a liberal construction ; and shall take the liberty of trans-

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posing some of the clauses, but without changing a single letter, as by so doing the several sections may be well reconciled with each other.

By the act concerning the Court of Appeals,

Section 14. *Appeals, writs of error, and supersedeas*, may be granted, heard, and determined, by the Court of Appeals, to and from any final decree or judgment of the High Court of Chancery, General Court, and District Courts, in the same manner *and on the same principles* as appeals, writs of error, and *supersedeas*, are to be granted, heard, and determined by the High Court of Chancery and District Courts, to and from any final decree or judgment of a County, City, or Borough Court.

We are to inquire then, in what manner, and on what principles, those *appeals*, writs of *error*, and *supersedeas*, are granted; but on this occasion it may be confined to *appeals*, they being the only subject of the present inquiry.

To *appeal* from a judgment, or decree of an inferior to a Superior Court, is a matter of right, if it be done at the time or during the session of the Court at which the judgment or decree may be rendered.

By the 16th section of the act concerning the High Court of Chancery, one month is allowed to persons wishing to *appeal* from decrees of the inferior Courts to the High Court of Chancery, the person lodging with the Clerk of that Court a petition and copy of the proceedings, together with the bond, &c.

The petitioner having performed those requisites, there is no discretion left with the Chancellor, but the appeal is to be heard and determined in the same manner as if it had been entered at the time the decree was pronounced.

In the 59th section of the same act, after a short preamble, it is enacted, that upon a petition to any Judge of the Court of Appeals, or the Judge of the High Court of Chancery, in vacation *next after the term* when such decree shall have been rendered, for relief in such a case, if it shall appear to his satisfaction that the failure to appeal from his decree, at the time, or during the term when it was pro-

nounced, did not arise from any culpable neglect in the petitioner, or that, upon the whole circumstances of the case, the petitioner ought to have the benefit of an *appeal*, it shall be lawful for the said Judge to grant the said appeal, &c.

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This clause provides for cases that frequently happen from accidents, where the parties live in the vicinity of the Court.

The 18th section of the same act provides for cases more rare, and which generally arise from the very remote distance that the parties dwell from the seats of justice: it authorises the said Court, or the *Judge thereof in vacation*, for good cause shewn, to allow a petition of *appeal*, and if necessary, order a *supersedeas* to stop the execution of any decree pronounced by an inferior Court, at any time within *three years* after pronouncing the same; the party praying such appeal and *supersedeas*, complying with the terms which the said Court or *Judge* shall annex to such order; leaving it discretionary in the Court, or Judge, to impose such terms as the circumstances of the case may seem to require.

This I consider as a very beneficial and necessary clause in the act, and to which the reference in the 14th section of the act concerning the Court of Appeals forcibly applies.

It could never, in my apprehension, have been the intention of the Legislature, when forming a system for the equal distribution of justice throughout the State, to allow a party, in an inferior Court, three years to obtain an appeal, in certain cases, where the subject in controversy might not exceed thirty-three dollars and thirty-three cents; and tie down another party, in every case, let the circumstances be what they might, to the short space of time intervening between two sessions, formerly of the High Court, but now of the Superior Courts of Chancery; when the subject in litigation must at least amount to one hundred dollars, or 3,000lbs. of tobacco, that being the smallest sum for which an appeal will lie from the Superior

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Courts of Chancery to the Court of Appeals ; and it may frequently happen that the whole property and fortune of a party shall be at stake : and if it was proper to make any distinction between the cases, the indulgence should certainly, in my conception, have been extended to those who were *parties* in a Court having jurisdiction over the whole State, and many of them living at the distance of near four hundred miles from the seat of justice ; and since the establishment of the District Chancery Courts, there are still thousands of our citizens who live at the distance of near three hundred miles, from which circumstance a variety of accidents may happen to preclude them from making application for an appeal in the short space of time contended for.

A Judge of the Court of Appeals may, for good cause shewn, grant a *supersedeas* to a judgment of a District Court at *Common Law*, if error appears on the face of the record, at any time within *five years* after entering the judgment ; and why a person aggrieved by a decree in Chancery should be restricted to a few months when seeking redress, I confess myself at a loss to conceive.

Since the act of the 14th of *January*, 1807, the fourth clause of which (for a sound and obvious reason, which was to save the time of the Court overloaded with business) declares that no appeal from any decree pronounced in any of the Superior Courts of Chancery, should thereafter be granted by the Court of Appeals *in Court*, it has become more necessary that the power should be exercised by the Judges *out of Court*.

By taking these several acts together, considering them as one act, embracing the same subject, and giving them a liberal construction, I can perceive neither inconvenience nor injury to any one ; but, should a different construction prevail, I can foresee great inconvenience, much injury, and the probable ruin of families ; for, however unjust or injurious the decree, (and some such, from human fallibility, there are, have been, and may again be,) and whatever accident or misfortune may befall a party grieved (living,

perhaps, some hundreds of miles from Court) to prevent an early application for an appeal ; after the lapse of a few months, the chance of relief is gone for ever. And this, too, in a country distinguished for the *liberality* and *equality* of its laws.

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On every view that I have been able to take of the case, it appears to me that any Judge of the Court of Appeals is authorised (for good cause shewn, of which he is to be judge himself) to grant an appeal (and to award a *superseas* if necessary) from any decree of a Superior Court of Chancery, at any time within three years after the same may have been pronounced ; and I am, therefore, of opinion, that the motion to dismiss this appeal, as having been improvidently granted, ought to be overruled.

The majority of the Court, therefore, decided that the appeal had not been improvidently allowed ; and the motion to dismiss it was overruled.



Buster against Wallace.

Wednesday,
November 10.

THE appeal in this case had abated at the *March* term last, by the death of the appellant, and now *Hening* moved for a *scire facias* to revive it in the name of his executor. He cited the case of *Gibbs v. Perkinson*, (a) as in point.

An appeal having abated at *March* term by the death of the appellant ; a *scire facias* to revive it may be awarded at the ensuing *October* term. (a) 2 Hen. & Munf. p. 211.

Hay, on the other side, opposed the motion, on the ground that, if the appeal might be revived after a term had intervened, there would be no limitation. Perhaps the appellee might, at that moment, be pursuing his judgment against the representatives of the appellant, in the Court below. In the case of *Gibbs v. Perkinson*, the appeal abated at one term, and the *scire facias* to revive was awarded

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at the next. There was no intervention of a term as in this case.

Hening, in reply, observed that, although a *term* had not intervened in the case of *Gibbs v. Perkinson*, yet almost as great a period of *time* had elapsed as in the present case. That appeal abated at the *October* term, 1807, and the *scire facias* to revive was awarded at the *March* term, 1808. The interval of fifteen days between the *March* and *April* terms, would not afford counsel an opportunity of ascertaining the names of the representatives of a deceased party ; and, it was understood to have been settled in the case of *Turpin*, administrator of *James*, v. *Thomas*,^(a) that the practice of reviving appeals in the names of the *representatives* generally, would no longer be permitted by the Court.

(a) 2 Hen. &
Munf. p. 139.

Judges TUCKER and FLEMING were of opinion, that, in consideration of the short interval between the *March* and *April* terms, the motion might be granted ; but were not disposed to extend the indulgence any further.

Judge ROANE was opposed to the motion.

The *scire facias* to revive the appeal was awarded.

Gordon and others against Browne's Executor.

Tuesday,
November 15.

JAMES GORDON, Walter Monteath, and William Robertson, styling themselves surviving partners of John Glasford, James Gordon, Walter Monteath, William Robertson, Neil Jameson, Adam Fleming and James Glasford, late merchants and partners acting under the firm and style of Adam Fleming, brought an action of debt on a bond in the Williamsburg District Court, against John Colgin, executor of John Brown, deceased.

The declaration stated the bond to have been executed by the testator on the 4th of *January, 1773, to Adam Fleming, and described it as payable to Adam Fleming, without alleging that it had been taken by Adam Fleming, for the benefit, or to the use, of the said mercantile company: and then charged, that nevertheless the said John Brown, or the defendant, his executor, although often required, had not paid, &c. to the merchants and partners above mentioned, repeating their names.*

On the trial of an issue, joined on the plea of "payment by the testator," the Jury found a verdict for the *defendant*; no exceptions having been taken by the *plaintiffs* to the evidence adduced. The counsel for the plaintiffs then moved the Court for a new trial; which motion being overruled, they tendered to the two Judges then sitting, a paper which they prayed to be signed and sealed as their bill of exceptions. In that paper it was stated that, on the trial, the plaintiffs had offered in evidence a bond, a copy of which was inserted, and which appeared to be a plain bond from *John Brown to Adam Fleming, bearing date the 4th of January, 1775, (nothing being said therein concerning the said mercantile company,) with an indorsement thereon in these words: "Commissioner's Office, Richmond, April 13th, 1801. I, Carter B. Harrison, surviving executor of James Willison, who was executor of Adam Fleming, do assign the within bond to James Gordon, Wal-*

An action cannot be maintained by a mercantile company on a bond payable to *A. F.* his heirs, &c. without averring in the declaration the said bond to have been given to *A. F.* for their use, or to have been assigned to them by *A. F.* or by his legal representatives.

The assignee of a bond cannot sue as obligee, but must set forth the assignment in his declaration.

If the bond be described in the declaration as bearing date on the 4th of *January, 1773, and the date of the bond produced to the Jury be the 4th of January, 1775, a general verdict for the defendant ought to be sustained.*

A paper intended as a bill of exceptions to an opinion of a District Court (two Judges being present) ought not to be considered as such, if not signed by both the Judges.

be considered as such, if not signed by both

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ter Monteath, and *William Robertson*, surviving partners
“ of *Glasford, Gordon, Monteath and Co.* in conformity to
“ a decree of the High Court of Chancery of the 10th day
“ of *March* last, and without recourse. *Carter B. Har-*
“ *rison.*” That the only evidence offered by the defend-
ant was the presumption arising from length of time, and
that the defendant’s testator was always a man of ability to
pay his debts, and left sufficient property at his death ; also
that *Adam Fleming* did not leave the State of *Virginia* at
any time ; that *Carter B. Harrison, James Willison, and*
Adam Fleming, resided in the same County ; and that *Adam*
Fleming and the defendant’s testator resided within sight of
each other, on the opposite sides of *James River*. To re-
but the presumption from length of time, relied on by the
defendant, the plaintiffs, besides the act of Assembly
passed the 19th of *December, 1792*, which takes out a por-
tion in the computation of time, (a) gave in evidence the
proceedings in a suit in the late High Court of Chancery,
brought on the 23d of *March, 1792*, by *Glasford, Gordon,*
Monteath and Co. of the town of *Glasgow*, in *North Britain*,
against *Carter B. Harrison*, executor of *James Willison*,
who was executor of *Adam Fleming*, to obtain possession
of the bonds, bills, accompts, and books belonging to the
said mercantile company, which at the time of his death
were in the possession of the said *Adam Fleming*, whom they
stated to have been the acting partner of the said company
in *Virginia*, and to have conducted the whole concerns
thereof, for the joint account and benefit of himself and of
the said company, for a number of years prior to his death,
which happened in the year 1776 ; in which suit a decree
was entered on the 10th of *March, 1801*, directing “ the
“ defendant, *Carter B. Harrison*, to assign to the plaintiffs
“ certain specialties, (all of which were described, in a re-
“ port of the Commissioner in Chancery, as payable to
“ *Adam Fleming*, but were said by the said Commissioner
“ to have been taken for dealings at the store kept under
“ the management of *Adam Fleming*, as the partner and
“ factor of *Glasford, Gordon, Monteath and Co.*) upon the

(a) See *Rev. Code*, 1 vol.
c. 76. s. 11.
p. 109.

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"plaintiffs' giving sufficient security that they would ac-
"count for what should be collected, with the parties en-
"titled thereto; but neither the said *Carter B. Harri-*
"son, nor the estate of his testator, were in any man-
"ner to be rendered liable by the said assignment."

This being the substance of the paper offered as a bill of exceptions, one of the Judges, who was in favour of the motion for a new trial, signed and sealed it; but the other Judge refused, "because his reasons for not granting a new trial the Court of Appeals have nothing to do with; because it is an improper manner of taking the trial from the legal tribunal, and may be continued *ad infinitum*; and because the evidence, being often, as in this case, fugitive, can not appear with the same complexion to the Court, as it did on the trial to the Jury, nor can a Judge's memory or notes be relied on in such case for the accuracy of the statement, which the objecting Judge thinks the bill signed is liable to." And thereupon the plaintiffs appealed to this Court.

Williams, for the appellant. The only question is, whether the evidence offered by the plaintiffs was sufficient to take the case out of the presumption. The long suit in Chancery, which lasted many years, to get possession of the bond, together with the circumstance that *Adam Fleming*, the acting partner, died in 1776, (which was stated in the bill and not denied in the answer,) furnished sufficient grounds to rebut the presumption. The District Court ought therefore to have awarded a new trial; and the case of *Baring v. Reeder* (a) shews that this Court will award a new trial when improperly refused by the District Court.

(a) 1 Hen. &
Munf. 154.

The *Attorney-General*, for the appellee. If I am not deceived, there is in this case a preliminary question of great importance never agitated before; whether this is a regular bill of exceptions?

In *Baring v. Reeder*, the ground of the new trial was, that important evidence offered to the Jury had been excluded

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by the Court : but here there was a general verdict for the defendant, and a motion for a new trial was made on the ground that the *verdict was contrary to evidence*. The paper tendered as a bill of exceptions, does not state *all* the evidence, and is not signed by both Judges, but only by the Judge in favour of the motion. One very sound objection made by the other Judge, was, that it could not be relied upon as an accurate statement of the evidence ; and these are certainly strong reasons against this mode of practice, of excepting to the opinions of Judges refusing new trials ; it being impossible for attorneys, merely from *recollection*, to state the evidence correctly.

But a paper is not a bill of exceptions unless it be signed by *both the Judges*. In a County Court it must be signed by the *majority of the Justices present* : and in a District Court, as two Judges constitute the Court, both must join ; (a) for the only validity of a bill of exceptions, as to its statement, is derived from its being *signed by the Court*.

(a) See *Rev. Code*, 1 vol. c. 44. p. 44.

If the other Judge improperly refused to sign, perhaps the proper remedy would have been by an application to the General Court for a *mandamus* to compel him to sign.

The suit in Chancery relied on to repel the presumption was between other parties. *Brown* was no party to that suit, and nothing was said in it about *this bond*. The record therefore was not evidence in the suit against *Brown's* executor.

As the bond was payable to *Adam Fleming*, what prevented him or his representatives from bringing suit, and recovering the money ? And payment might have been made to him or his representatives.

Williams was about to reply, when Judge TUCKER asked whether, *on the declaration*, the plaintiffs had entitled themselves to recover on this bond ? The bond was to *Adam Fleming* only ; and the declaration contained no averment that it was given to him for a debt due to the *partnership*. The Court or Jury might have gone on the ground that there was no evidence of that fact. *Williams* observed, that

if *A. B. and C.* are partners in trade, under the firm and style of *A.* only, it will do.

As to the bill of exceptions ; the Judge who refused to sign, does not say that the allegations contained in them were not true. I have always understood that the signature of exceptions by one Judge was enough.

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Judge TUCKER. In this case there is another difficulty. The exception is to the opinion of the Judge who did not sign it.

Williams. The Court being divided, there was judgment for the defendant ; and the exception was to that judgment. The record from the Chancery was admissible. The assignment of the bond was in obedience to the decree.

Judge TUCKER. Then ought not suit to have been brought on it as an assigned bond ?

Williams. The assignment was only to authorise them to bring suit : but the bond being their own, they had a right to sue upon it as their own. The bill did not pray for an assignment, but only that the bonds, &c. should be delivered up.

Tuesday, November 15. The Judges gave their opinions.

Judge TUCKER. The appellants brought suit in the *Williamsburg* District Court, on a bond given to *Adam Fleming*, deceased, which was in the usual form, payable to him, his executors, administrators, or assigns ; their declaration being in these words : *James Gordon, William Monteath, and William Robertson*, surviving partners of themselves. *J. Glasford, N. Jameson, Adam Fleming*, and *James Glasford*, deceased, late merchants and partners, acting under the style of *Adam Fleming*, complain of *John Colgin*, executor, &c. of a plea of debt, that he, the said

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defendant, render to them, the said plaintiffs, 158*l.* which he unjustly detains, for that whereas the said *John Brown*, in his life-time, on such a day and year, &c. by his certain writing obligatory, sealed, &c. acknowledged himself to be held and firmly bound to the said *Adam Fleming*, in the said sum of 158*l.* to be paid to the said *Adam Fleming*, when, &c. in the usual form, without alleging that the bond was made to THEMSELVES, by the name and style of *Adam Fleming*; as perhaps they might, but certainly must have done in order to entitle them to bring an action therefor, unless in the character of executors, administrators or assigns of *Adam Fleming*, or of his legal representatives. The Jury found a verdict for the defendant; it is unnecessary to inquire upon what principles, and whether right, or wrong, the declaration not shewing, as it ought, any right in the plaintiffs to bring *this* action, (a) although, perhaps, they might have sustained an action, if the declaration had been adapted to the nature of the plaintiffs' case, such as it appears to have been from the matter inserted in the record, of which there is no necessity to take further or more particular notice.

(a) *Vid.*
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tox, 1 *Call*,
257.

I, therefore, think the judgment must be affirmed.

Judge ROANE. The statute of *Westm. 2.* respecting bills of exceptions, from which our act seems to be taken, (and the constructions made thereupon,) recognise, as sufficient, a bill of exceptions signed by *one* of the Justices; (b) but our act varies from it in this particular, and requires that *all* the Justices, "or the greater part of them present," shall sign it. This not being done in the present case, we cannot act upon the bill in question, nor take cognisance of any of the facts it contains. The case then stands merely upon a general verdict, which we must take to be warranted by the evidence, as the contrary does not appear. I am, therefore, for affirming the judgment; especially as the appellants' claim to recover as a copartnery, on a bond not alleged in the declaration to have been given to them as such, but rather to have been given to *Fleming* in

(b) See 1
Bac. Abr.
529. *Gwil.* ed.

his individual character : and, even if we were at liberty to go into the paper tendered as a bill of exceptions, there is a variance between the bond shewn in evidence, and that declared on, not only in that the bond *exhibited* has enured to the benefit of the appellants by *assignment*, of which assignment no mention is made in the declaration ; but also that the bond, as set out in the bill of exceptions, bears date the 4th of *January*, 1775, whereas the bond declared on is stated to have borne date on the 4th of *January*, 1773.

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Judge FLEMING concurring, the judgment was unanimously AFFIRMED.



Rice and others *against* Efford and another.

Wednesday,
November 18.

ON an appeal, taken by the defendants, from a decree of the Superior Court of Chancery for the *Williamsburg* District, pronounced in *October*, 1803.

The appellees, *Ann Efford* and *Thomas Shurley*, (the complainants in the Court of Chancery,) were illegitimate children of *Richard Rice* and *Judith Shurley*, who, after the birth of those children, and about the year 1776, were married. *Richard Rice* had other children by a former venter, (confessedly born in wedlock,) as well as children by *Judith Shurley*, after their intermarriage. He died in the year 1799, having previously, on the 31st of *January*, 1795, caused his will to be written, in which he recognised his illegitimate children in the following terms : " I give " and bequeath to my son *Thomas Shurley*, born before " wedlock, my land in *Northumberland* County, formerly " belonged to *Robert Sibbles*. Should *Thomas Shurley* die " without lawful heir, my desire is, that his sister *Anna Rust* " *Shurley* (afterwards *Efford*) should have all his part of my

An illegitimate child, born before the first of *January*, 1787, of parents who intermarried also before that period, (the father, who died in 1799, having recognised the child by his will as his own, though born before wedlock,) is entitled to an equal distribution of the father's unbequeathed estate, with his other children born after the marriage.

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"estate, being born before wedlock." The rest of his estate was given to his other legitimate children. This will was signed by the testator, but it was neither in his hand-writing, nor was it attested by any witnesses.

The District Court of *Northumberland*, in *April*, 1799, established the foregoing paper as sufficient to pass the personal estate ; and the object of this suit was to have an equal distribution of the real estate among all the children, as well those born before, as after wedlock.

The answer relied on the circumstances, that, if a marriage ever did take place between *Richard Rice* and *Judith Shurley*, (which was denied,) it must have been before the 1st day of *January*, 1787, when our new law of descents took place ; and that, as the complainants were originally bastards in the eye of the law, and were not legitimated by any subsequent act, they were not entitled to any part of the lands.

The fact of the marriage was established by testimony ; and the Chancellor being of opinion " that the recognition " of the plaintiffs by their father, subsequent to the operation " of the act to reduce into one the several acts directing " the course of descents, was fully proved," decreed an equal distribution of the lands whereof *Richard Rice* died seised, among *all* his children, as well legitimate as illegitimate. From this decree the defendants appealed.

Randolph, for the appellants, said that he would attempt to distinguish this case from that of *Stones v. Keeling*, decided in *May*, 1804 ; but, on being told by Judge *TUCKER* that the principal point relied on, had been expressly decided in *Stones v. Keeling*, *Mr. Randolph* did not press the argument any further.

Warden and Heath, for the appellees. The will of *Richard Rice* not being wholly in his hand-writing, or attested by the number of witnesses required by law, it was correctly decided by the District Court that it was not sufficient to pass real estate. The sole question then is, ought the

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lands of a testator, as to which he dies intestate, to be equally divided among all his children, whom he recognises as such, whether they be born before or after the marriage with their mother. The law is explicit on this point,(1) and the only inquiry is, whether the will of *Richard Rice* be sufficient evidence of a recognition of the appellees, who were his children born before wedlock. The marriage is not only proved by witnesses, but is admitted by the devisor himself, in his will. He says they were both *born before wedlock*, and calls one "*his son*," and the other the "*sister*" of that son. He uses the same terms with respect to the children born *before* marriage and those born *after*.

In the case of *Stones v. Keeling*, the Court decreed that the children of a marriage deemed *null* in law, should equally take with others. The clause of the act of Assembly, which provides for the legitimization of children born *before wedlock*, is equally powerful; and the Chancellor having directed a distribution of the lands among *all the children* of the testator, made a correct decree, which ought to be affirmed.

Wednesday, November 16. The Judges gave their opinions.

Judge TUCKER. The only question is whether an illegitimate child born before the first of *January, 1787*, of parents who afterwards intermarried, and the father recognised the

(1) This act first passed in 1785, and took effect the 1st day of *January, 1787*. It is now incorporated in the *Revised Code*, vol. 1. c. 93. p. 170. s. 19. and is in the following words: "Where a man having by a woman one or more children, shall afterwards intermarry with such woman, such child or children, if recognised by him, shall be thereby legitimated. The issue also in marriages deemed null in law, shall nevertheless be legitimate."

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child by his will, is within the benefit of the statute. Being satisfied of both these facts, from the evidence, I shall beg leave to read my notes in the cases of *Stones v. Keeling*, (1)

(1) *STONES v. KEELING*, May 12th, 1804. MS.

This was an appeal from *Suffolk* District Court, affirming the grant of administration on the estate of *William Keeling*, senior, deceased, by the Court of *Princess Anne* County, to the defendant, *Frances Keeling*, widow of *William Keeling*, junior, son of the intestate *William Keeling*, senior, and mother of the children of the said *William Keeling*, junior, to whom, since the grant of administration to her, the guardianship of those children has been committed.

The appellants are the husbands of two daughters of the intestate by one *Athalia Arbuckle*, to whom, it is contended on the part of the appellee, he was never in fact married; or, if he was ever married to her, that she was then the wife of one *William Arbuckle*, now living. To this the appellants reply that, were this proved to be the case, (which they deny,) the act of 1785, c. 60. (*Rev. Code*, c. 93. s. 19.) legitimates the daughters, who are by virtue thereof entitled to a share of the estate, and to the administration as next of kin to the intestate.

Upon the whole of the testimony, I think the fact of both marriages is proved, and, if the question turned entirely upon those facts, I should be of opinion that the judgment of the District Court ought to be affirmed. (a)

But the act of Assembly, which declares that the issue of marriages deemed null in law, shall nevertheless be legitimate, does, in my apprehension, apply to the daughters in this case, notwithstanding all that was urged to the contrary. The father did not die until after the commencement of that act; the rights of the daughter to his property did not commence till his death.

The question as between these parties did not, nor could it exist until that event; and the act was then in full operation. The words *null* and *void* are perfectly convertible terms, and mean the same thing. The widow of the son was not entitled to administration in preference to the daughters; had she even administered upon the son's estate, which does not appear; nor could she, as guardian to the grandchildren, have been entitled to any preference, had she been appointed guardian before administration granted, which was not the case.

The act of 1785, it should be remembered, relates to the disposition of property only; and proceeds to shew who shall be admitted to share the property of a person dying intestate, notwithstanding any former legal bar to a succession thereto; and, in that light, the law ought to receive the most liberal construction: it being evidently the design of the Legislature to establish the most liberal and extensive rules of succession to estates, in favour of all, in whose favour the intestate himself, had he made a will, might have been

(a) *Vide* 4

Burr. 2059. 1
Black. Rep.
632. 1 *Black.*
Com. 440. 457.
5 *Co. Rep.* 98.
2 *Black. Com.*
436. 1 *Salk.*
120. 3 *Lec.*
410. *Bull. N.*
P. 112. 2 *Esp.*
209.

decided the 12th of *May*, 1804, and *Sleighs v. Strider*, (1) the 20th of *April*, 1805.

Judge TUCKER having read these two cases, as inserted in the notes below, concluded with expressing his opinion that the decree of the Superior Court of Chancery was correct, and ought to be affirmed.

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supposed to be influenced. And here, there can be no doubt, had he died testate, that these daughters would have been the first objects of his care. (a)

(a) Vide 2
Fend. 124.

Roane, Judge, concurred.

Fleming, Judge, concurred.

Carrington, Judge, concurred.

Lyons, Judge, concurred.

Judgment reversed *May* 12, 1804.

(1) SLEIGHS V. STRIDER, *April* 20th, 1805. MS.

Appeal from the *Winchester* District Court.

William Hall devised lands to his son *Richard Hall* "during his natural life, and no longer; and, after, to his eldest son, and his heirs for ever; but if no male issue, to his eldest daughter and her heirs for ever." *Richard Hall* had a natural son born in the year 1776; and, in 1778, married the mother, and recognised the child as his till his death in 1796. The father and son, by deed of bargain and sale, conveyed to the defendants. The father afterwards dying, without ever having any other son, but having several daughters; the eldest brought suit for the lands, claiming them under the before mentioned clauses in his grandfather's will.

Mr. Call, for the plaintiff, insisted,

1st. and 3d. That *Richard Hall* took an estate for life only; that the limitation to (*Elizabeth*) his eldest daughter, was good; and that she, on the death of her father, became entitled to these lands; and relied on 1 *Salk.* 236. 1 *P. Wms.* 54. *S. C. Blackburn v. Edgely*, H. 600. 2 *Wash.* 9. *Roy v. Garnett*.

Mr. Wickham, contra, relied on the rule in *Shelly's* case, 1 *Co.* 99. 2 *Wash.* 31. 1 *P. Wms.* 756.

2d. point. That *Thomas Hall*, the son of *Richard*, being born out of wedlock, and before the act of 1785, was not eldest son of *R. H.* in a legal line, and consequently could not take as heir, or under the devise.

This point appearing to me to embrace the whole case, I shall pass over the others: the words of the law are; "where a man having by a woman one or more children, shall AFTERWARDS intermarry with such woman, such child, or children, if recognised by him, shall thereby be legitimated."

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Judge ROANE. There are two questions in this case. 1st. Whether the marriage of the parents of the appellees is sufficiently proved;—and, 2dly. Whether that marriage (being antecedent to the act of 1785) is embraced thereby.

As to the first question, I am of opinion, that under the liberality of construction which is allowed in relation to the proof of marriage, and under which this Court acted in the case of *Stones v. Keeling*, the marriage in question is abundantly proved. The testimony of *Elizabeth Stott, Thomas*

It is contended that the word *shall*, being a word importing a thing to be done, or to happen *after* another thing which is done, or hath happened, must necessarily refer to marriages to be solemnized *after* the passing of the act; and cannot be construed to have any other relation.

If this be the true construction, the meaning of the law will be the same, whether the word *afterwards* be inserted therein or not. But will it be said, that, if that word were stricken out, the sense of the law would be precisely as it is now. The word *shall*, would in that case indubitably apply to the time of passing the act.

The word *afterwards*, can never be applied but to a thing spoken of *before*; the thing spoken of before in the act, is the having children born before wedlock; the thing to be done *afterwards*, is the marrying the woman, and recognising the child.

If the sense contended for by Mr. Call, were the proper sense of the law, the word *afterwards*, must be construed as the word *HEREAFTER*; whereas I am confident there is no lexicon in the *English* language in which it will be found in that sense; its synonyme is *THEREAFTER*.

Whenever a past event is spoken of, and another possible event, posterior thereto, is spoken of at the same time; the word *shall*, never imports a future, in reference to the time of speaking, but a future in reference to the first event only; *shall*, in all such cases means "*shall have*."

The law intending to provide for all cases, generally, this arrangement of the sentence was necessary to embrace every possible case of the kind, and was meant, not only to encourage marriages after the passing of the law, but to protect and provide for the innocent offspring of indiscreet parents, who had already made all the atonement in their power, for their misconduct, by putting the children whom the father recognised as his own, on the same footing as if born in lawful wedlock.

In conference (*absente* Judge FEMING) the Court were unanimously of opinion that any legitimate son of *Richard Hall*, the devisee of *W. H.* who might have been born during the life-time of his father, was capable of taking the lands in question under the devise in the will of the said *William Hall*; and that *Thomas Hall*, son of the said *Richard Hall*, under the operation of the act directing the course of descents, answering to that description, there was no error in the judgment of the District Court.

Judgment AFFIRMED.

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Coleman, and *B. McCarty*, which alone might be sufficient, is confirmed, beyond all question, by the will contained in the record, which not only recognises the plaintiffs as the children of the testator, but also *admits a marriage*.

As to the second question, it was held in the case of *Stones v. Keeling*, that the issue of marriages, existing at the time of passing the act, which were deemed null in law were legitimatd by the act: and I see no reason for a diversity of construction in relation to the question before us, touching the legitimating bastard children, by a posterior marriage between their parents, under the same section of the act; except what arises from the words, "*shall afterwards intermarry*," which might seem to import only marriages to be celebrated in future. That word "*afterwards*," however, is more properly to be referred to the birth of the bastard children, than to the passage of the act; and no good reason could possibly have existed with the Legislature, for varying the construction of a section embracing two descriptions of cases standing on a similar foundation. No objection to this construction can arise, in either case, on the ground that the act invades private rights:—at most, in the case before us, it is only a *possibility* of an interest that is invaded; a possibility in relation to the children born in wedlock, depending upon their surviving their father, and his dying intestate. This construction of the act, therefore, however it may be as to the inception of the right, is only *prospective* as relates to the consummation of it;—it applies to cases only where the father has *died* posterior to the passage of the act. This case therefore varies from that of *Elliott v. Lyel*: (a) in that case the construction contended for was repelled, as it went to vary the *contract* of the parties from what it was under the law existing at the time it was entered into.

(a) 3 Call,
268.

As to the case of *Sleighs v. Strider*, I have seen Mr. Call's note of it. According to *that*, it would seem that the judgment was merely *affirmed* by the Court; and as the appellee's counsel had contended, (as appears from his statement,) first, that *Richard Hall* took an estate tail,

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which was turned into a fee, by the act of 1776; or secondly, that *T. Hall* was legitimated by the act of 1785; it does not necessarily follow that the *last* was the ground of decision upon which the judgment of the Court was founded. I have no doubt, however, of the accuracy of the note of the Judge who preceded me, in relation to what passed in conference on the subject; and on the whole, am of opinion to affirm the decree.

Judge FLEMING said it was the unanimous opinion of the Court that the decree be AFFIRMED.



Moore's Executor against the Auditor.

Tuesday,
November 22.

All deeds of trust and mortgages of slaves, or other personal estate are void against creditors and purchasers for valuable consideration, not having notice thereof, unless the same be acknowledged by the party, or parties, or proved by three witnesses, and thereupon duly recorded.

AT a General Court, holden in *November*, 1799, a judgment was obtained by the Auditor of Public Accounts, on behalf of the Commonwealth, against *John Verell*, sheriff of *Dinwiddie* County, for a balance due from him of the taxes for the year 1798, together with damages and costs according to law. On the 4th of *February*, 1800, an execution was issued against the lands and tenements, goods and chattels of the said *John Verell*, on which the following return was made: "*April* 19, 1800, executed on 697 acres of land, twenty-two negroes, waggon and team, and twenty-five head of cattle, for all which lands, slaves, and chattels, deeds of trust for the benefit of *George Pegram* and *Robert Moore*, recorded in the District Court of *Petersburg*, were produced by the said *Pegram* and *Moore*, who forbid the sale. The within mentioned *John Verell*

The Courts of Chancery have jurisdiction in all cases where property taken in execution on behalf of the Commonwealth is claimed by any person under a mortgage or deed of trust; and if such mortgage or deed of trust be found *not to have been duly recorded*, may (notwithstanding no fraud be proved) decree the same to be void as against the claim of the Commonwealth.

“ has no other lands, tenements, goods or chattels, within
“ my bailiwick, whereof I can make any part of the within
“ mentioned sum. *R. P. Downman*, sheriff.”

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Two of the deeds referred to in this return were for the benefit of *Robert Moore*, dated the 4th of *August*, 1798, and recorded, on the acknowledgment of the parties, *April* 17th and 18th, 1799: the other (by which *slaves only* were conveyed) was a deed of trust in favour of *George Pegram*, jun. dated the 30th of *August*, 1799, attested by two witnesses, and recorded, on their evidence, the 19th of *April*, 1800.

The Auditor filed a bill in the late High Court of Chancery against *John Verell*, *Robert Moore*, *George Pegram*, jun. and their several trustees, to set aside those deeds as fraudulent; alleging, too, that, if the same were bottomed on good faith, yet the claim of the Commonwealth was paramount thereto. The prayer of the bill was for a discovery of the consideration on which the said deeds were made; that if found void of consideration, they should be cancelled; that at any rate, the judgment of the Commonwealth might be preferred; and for general relief. All the defendants filed answers positively denying fraud, and setting forth valuable considerations, sufficient to authorise the several deeds.

No depositions were taken in the cause, which being heard on the bill, answers and exhibits, on the 20th of *February*, 1808, the Court “being of opinion that the deeds in “question, not having been recorded within the time prescribed by law, were void as to all creditors and subsequent purchasers for valuable consideration without notice, therefore decreed the same to be void as aforesaid:” from so much of which decree as related to the defendant, *William Bowden*, executor of *Robert Moore*, (who had departed this life during the pendency of the suit,) that defendant appealed to this Court.

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George K. Taylor, for the appellant, observed, that the Chancellor was mistaken in saying that all the deeds were not recorded within the time prescribed by law. Pegram's deed was in due time.

The plaintiff in this case came into Chancery, charging *fraud*, which the answers denied; and no fraud being proved, the bill should have been dismissed. If the Auditor had sued for the purpose of having the deeds declared void as to creditors, &c. on the ground of their not having been recorded in time, the Court might have dismissed his bill, this being no ground for going into equity, the law having already provided for the very case. The prayer of the bill then being for relief against *fraud*, ought the Chancellor to have gone on to relieve on mere *legal* grounds? He should have dismissed the bill, reserving to the Commonwealth its right under the general law, made for its benefit and that of all other creditors.

The Attorney-General admitted the mistake, concerning Pegram's deed; which he said arose from an error committed by himself in drawing the bill. But this was not important; for the deed was proved by *two witnesses only*; whereas, under the 1st and 4th sections of the act for regulating conveyances, (a) *three* were requisite to the proof and recording of "*all deeds of trust and mortgages*." True it is, the statute of frauds (b) requires only two witnesses to conveyances of goods and chattels; but that statute says nothing of *deeds of trust and mortgages*, which, it is evident, the Legislature intended to put on a different footing from other deeds. The provisions of the two acts differ in another respect. The conveyances mentioned in the statute of frauds must be recorded in the *General Court*, or in the Court of the *County* where one of the parties resides; but it is by virtue of the act for regulating conveyances, that deeds of trust, &c. may be recorded in a *District Court*. This deed was recorded under the last mentioned act, and must be governed by its provisions; if it was not, it was admitted to record in the improper Court.

(a) Rev.
Code, 1 vol.
c. 90. p. 156,
157.

(b) Ibid. p.
16. c. 10. s. 2.

As to the question whether the Chancellor ought to have decreed in favour of the Commonwealth, on the ground that the deeds had not been duly recorded, this suit was instituted under the act of Assembly, (a) to try the validity of those deeds; and the bill stated two grounds of relief; first, *fraud*; secondly, that the claim of the State under the judgment was paramount to the deeds; concluding with a prayer for general relief, which prayer was fully sufficient to cover the whole case; and indeed under the act, it was the duty of the Court to investigate, generally, the validity of the deeds.

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(a) Rev.
Code, 1 vol.
c. 84. s. 31. p.
139.

Mr. Taylor, in reply, said, that, according to the Attorney-General's interpretation of the act for regulating conveyances, there was no provision as to the place where a mortgage of *slaves* in *Richmond*, made by a person residing in *Hampton*, to another in *Staunton*, should be recorded; for the first section relates to *lands* only, and directs the deeds therein mentioned to be recorded in the General Court, or the Court of that District, County, City, or Corporation, in which the *land* lieth.

Judge TUCKER observed that this difficulty was removed by the case of *Claiborne's Executor v. Hill*, 1. Wash. 177.(1)

Friday, November 5. The Judges delivered their opinions.

Judge TUCKER. Three questions arose in this cause.
1. Whether a deed of trust, or mortgage of lands, or slaves,

(1) Note. It appears from the record of that case, that *Herbert Claiborne* resided in *New Kent* County, and *Augustine Claiborne* in *Sussex*; that the slaves conveyed by the mortgage from *Herbert* to *Augustine Claiborne*, bearing date the 1st of *February*, 1783, were on a plantation in *King William* County; and that the mortgage, which was recorded in *New Kent*, (where the mortgagor resided,) was declared by the Court of Appeals to have been duly recorded.

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or other personal chattels, not proved or acknowledged within eight months from the execution thereof, be void as against creditors ; and, consequently, the property thereby conveyed, liable to be taken in execution to satisfy a judgment obtained in behalf of the Commonwealth ; under the act of 1792, (*Rev. Code*, 1 vol. c. 90. s. 4.) concerning conveyances, which declares that *all* deeds of trust and mortgages, *whatsoever*, thereafter to be executed, shall be void as to all creditors and subsequent purchasers, unless they shall be acknowledged, or proved according to the directions of that act ; and *ibid.* c. 84. s. 9, 10. 17. concerning the recovery of debts due to the public.

2. Whether a deed of trust of *slaves* or *personal estate* be also void as against creditors, &c. if not acknowledged by the party delivering the same, in Court, or proved by *three* witnesses pursuant to the first and fourth sections of the same act first mentioned, concerning conveyances.

3. Whether the Court of Chancery hath jurisdiction in cases where property taken in execution in behalf of the Commonwealth, shall be claimed by any other person, under any deed of trust or mortgage for the same, under the provisions contained in the 22d and 31st sections of the act concerning the recovery of debts due to the public. *Ed.* 1794, c. 84.

I am clearly of opinion that all deeds of trust and mortgages, coming under either of the above descriptions, are void as against creditors and purchasers without notice for a valuable consideration, and that the lands, slaves, or other property thereby conveyed, are liable to the Commonwealth's execution ; and finally, that the Court of Chancery hath jurisdiction in all such cases.

Judge ROANE was of the same opinion.

Judge FLEMING. On my first inspection of the record, I supposed that the deed from *Verell* to *Pegram* and *Nicholas*, conveying *personal estate* only, and having been admitted to record within eight months from its date, was

valid against subsequent purchasers and creditors ; but upon recurring to the act of Assembly for regulating conveyances, passed in the month of *December*, 1792, it appears not to have been proven as the law directs.

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In the 4th section it is enacted, that all deeds of trust and mortgages whatsoever, which shall thereafter be made and executed, shall be void as to all creditors and subsequent purchasers, unless they shall be acknowledged or proved, and recorded, according to the directions of the act ; which directions, by the first clause of the act, are, that the deed be either acknowledged by the party or parties, who shall have sealed and delivered it, or be proved by *three* witnesses, to be his, her, or *their* act, &c. and the deed in question having been attested and proved by two witnesses only, is void as to creditors and subsequent purchasers without due notice ; I am therefore of opinion, that the decree is correct and ought to be affirmed.

By the whole Court, the decree was AFFIRMED.

Lyons, surviving Executor of Claiborne, *against*
Gregory.

Tuesday, No-
vember 22.

PHILIP W. CLAIBORNE, in *May*, 1771, obtained a judgment of *King William County Court* against *Richard Gregory*, for 47*l.* with interest from the 18th of that month, Where the judgment of a District Court reversing that of a County Court, is not in its nature final, but remands the cause for further proceedings ; and the subsequent judgment of the County Court is also reversed by the District Court ; the Court of Appeals, if the original judgment of the County Court be correct, will reverse all the subsequent judgments, and affirm that.

The act of 1792, for limiting the time within which a *scire facias* may be issued on a judgment, (*Rev. Code*, 1 vol. c. 76. s. 5. p. 108.) did not apply to a *scire facias*, previously sued out, by leave of the Court, to revive a judgment which was more than ten years old when such leave was given.

Where the records of a Court have been destroyed, an *imperfect* minute of a judgment may be admitted to record under the act of Assembly, in lieu of the original ; provided the *substantial* parts thereof appear ; and the record of such minute, made by order of the Court, is good evidence on a plea of *nulli tibi record* ; although the Clerk has failed to indorse upon it that the original was lost, or destroyed, and has also failed to make an entry to the same effect in the record-book.

What variances between a judgment, and the recital thereof, in a *scire facias*, or in the judgment thereupon, are not material.

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and the costs. The Clerk certified a copy of the minute of the judgment, with his name annexed, without any initials, or other mode of expressing the nature of his office; and added his taxation of costs thus; "costs 146lbs. nett tobacco, 15s. and 1s. 3d."

(a) Rev.
Code, 1 vol.
o. 33. p. 58.

About the end of the *American* war, the Court-House of *King William* County was consumed by fire, together with a number of its records, and, among the rest, the documents on which this judgment was founded. An act of Assembly^(a) was passed to remedy the evils arising from that and other accidents of the same nature; under which act *Carter Braxton* and *Peter Lyons*, executors of *Claiborne*, produced the minute aforesaid to the Court of *King William* County, and that Court admitted it to record, and ordered a *scire facias* to be issued thereon to revive the judgment. Two writs of *scire facias* were successively issued, to which *nihil*s were returned by the Sheriff; (the defendant having removed out of the County;) whereupon a judgment by default was entered at rules on the 28th day of *March*, 1793, and confirmed on the 31st of *May* ensuing, for 47*l.* with legal interest thereon, from the 18th of *May*, 1771, till paid, and 146lbs. tobacco, 1s. 3*d.* and 15*s.* or 150lbs. tobacco, "being the amount of the judgment in the said *scire facias* mentioned."

To this judgment, *Richard Gregory* obtained a writ of *supersedeas* from the District Court of *King* and *Queen*, which Court reversed the judgment, remanded the cause to the County Court, and gave him leave to plead. Of this leave he availed himself on the 28th day of *August*, 1800, by pleading, 1st. *Nul tiel record.* 2d. *Non detinet.* 3d. *Nil debet*; and, 4th. That the *scire facias* was sued out on, a judgment obtained more than ten years anterior to the suing out thereof. To the 1st of these pleas the plaintiffs replied that there is such a record as that stated in the *scire facias*, &c. to the 2d there appears no replication; on the 3d plea they joined issue; and to the 4th the plaintiffs replied that leave of the Court was obtained to sue out the *scire facias*, although ten years had elapsed, after the date

of the judgment, before the leave was obtained. To this the defendant demurred generally, and the Court decided that point in favour of the plaintiffs. On examining the record, the Court declared that there is such a record as that mentioned in the *scire facias* : to which opinion the defendant filed a bill of exceptions. The issue joined on the third plea being tried by a Jury, a verdict was found, and judgment rendered thereupon for the plaintiffs.

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Another *supersedeas* was obtained by Gregory, assigning for error ; 1. That the *scire facias* reciting the judgment says it was "for debt," which words "for debt," do not appear in the minute of the judgment produced of record ; 2. That, in stating the costs, the *scire facias* doth not add to "146lbs." the word "nett" before "tobacco," as the minute produced doth ; 3. That, in the *scire facias*, the 15s. recovered in part of costs, is not followed by the words and figures "or 150lbs.tobacco," though these words follow in the judgment rendered upon the *scire facias* ; 4. That the minute aforesaid ought not to have been admitted to record, instead, or as a memorial of the judgment, under the act of 17th December, 1787 ; (a) because it is not certified to be a copy, nor is the cause of its rendition stated to be the default of the defendant, or any other appropriate cause, as *nil dicit*, &c. because the name, *Edmund Berkeley*, thereto subjoined, doth not appear to be the name of the Clerk of the Court ; and because the original transcript of the minute is not indorsed by the Clerk, "that the original "had been lost or destroyed ;" 5. That an entry to the same effect was not made on the record ; 6. That no issue was joined upon the plea of *non detinet* ; 7. That the Jury have found the debt due to the plaintiff, which cannot be, as he is an executor ; and, 8. That the law ought to have been declared for the defendant on the demurrer.

(a) Rev.
Code, 1 vol. c.
33. p. 38.

On the hearing of this *supersedeas*, the District Court reversed the judgment "because the County Court had "erred in permitting a copy of a judgment to go in evidence to the Jury which was *variant* from the judgment "stated in the writ of *scire facias* ;" from which judgment

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of reversal, *Peter Lyons*, the surviving plaintiff, appealed to this Court.

Warden, for the appellant, made the following points :

1. That the record in the original suit having been destroyed by fire, the minute of the judgment, being recognised by the County Court as an authentic document under the hand of its Clerk, and admitted to record, was the best evidence to prove the rendition of the said judgment.
2. That such minutes are always extended in the order-book so as to give judgments a more regular form ; and that the insertion of the words "for debt," in the *scire facias*, constitutes, on that principle, no variance between the judgment recited by it, and the judgment noted in the minute.
3. That the taxation of costs is the work of the *Clerk*, and not of the *Court* ; and that no variance between a minute of them (as made by him) and *legal costs*, can vitiate any judgment, or minute thereof. On this point he quoted *Heath's Maxims and Rules of Pleading*, p. 220. 224. 226.
4. That the finding of the Court, on the plea of *nul tiel record*, is evidence that the minute of the original judgment, and of the costs noted at the foot thereof, was entered of record, as expressed in the *scire facias* ; notwithstanding the insertion of the words "for debt" in the judgment, and the omission of the word "nett," and insertion of the words "150lbs. tobacco" in the statement of costs ; because these only reduced the minute aforesaid, to the form which the Clerk might have legally given it in an execution, or an order-book.
5. That the plea of *non detinet* on the *scire facias* was inadmissible, and an error of the defendant ; and, had it been otherwise, was, in effect, put in issue and tried on the plea of *nil debet* ; and that the finding of the Jury was a proper answer to that issue, and not liable to the exception taken to it.

Q. That the judgment overruling the demurrer was correct, not only in consequence of the circumstances attending the judgment sought to be revived ; such as the death of the original plaintiff, the removal of the defendant to distant parts, the existence of a tedious interval of war in this country, and occlusion of Courts ; in consequence of which circumstances, the leave to sue out the *scire facias* had been granted ; but, also, because the law, forbidding the issuing of a *scire facias* after more than ten years from the date of the judgment,(a) was not enacted when the leave was given and the *scire facias* issued ; or, if enacted, was not retrospective. Besides, the 14th section of the same act(b) exempts a case like this from its operation ; and the case of *Michell v. Cue and ux.* 2 Burr. 660. had, long before, established a similar principle.

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(a) Rev.
Code, 1 vol. c.
76. s. 5. p. 108.
(b) *Ibid.* 109.

Call, for the appellee, relied on the points stated in the petition for the *supersedeas* ; observing that a *scire facias* must pursue the judgment *in omnibus*, and that the least variance is fatal ; the reason of which is, that the actual judgment is always liable to be executed, and, if it be not strictly pursued, a judgment on the *scire facias* is no bar to a future judgment on the original.

The Sheriff's return, too, of "not found" on the *scire facias*, was not the return which the law then in force required.

It is now too late to affirm the first judgment of the County Court ; for that was reversed by the District Court ; and the plaintiff, not appealing, or making any objection, went to trial again in the County Court.

Wickham, contra. The original judgment of the County Court was right, and ought not to have been reversed ; and this Court must look into the whole record, and give judgment on the whole case. *Knox v. Garland*(c) shews that the plaintiff could not have appealed from the judgment of the District Court reversing that judgment of the County

(c) 2 Call.
241.

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(a) 3 Call, 243.
(b) 1 Hen. &
Munf. 54.

Court ; since the cause was not thereby finally disposed of, but only sent back for another trial. In each of the cases of *Robinson v. Gains*,(a) and *Biggers v. Alderson*,(b) there had been two judgments of the District Court, and the appeal was taken from the last only : yet this Court reversed them both, and affirmed the original judgment of the County Court.

A number of captious objections have been taken in this case : but they are all unimportant ; for the case of *Peter v. Cocke's Executor*,(c) proves that it is not necessary to state all the circumstances in describing a document, provided every thing *material* be mentioned. In this country the costs are never stated in the body of a judgment. In *England* the practice is otherwise ; the taxing costs *there* being under the inspection of the *Court* ; whereas *here* it is the mere act of the *Clerk*. The judgment is *general* for the costs, which are afterwards calculated by the Clerk. If, then, the alternative (15s. or 150lbs. tobacco) was not mentioned ; a complete bar to any objection on that account is, that the Court, *as to costs*, gave no judgment but *that of the law*.

This cause was tried on the plea of *mul tiel record* : the Court sat to try the fact : and the copy, or extract, (under the circumstances,) was the best evidence the nature of the case would admit of. Even in *England*, such a memorandum as this would be sufficient ; for *oyer* may be dispensed with where the original is lost. So, a patent may be presumed.

(d) Rev. Code,
1 vol. c. 76. s.
5. p. 108.

The act of 1792,(d) which limits the revival of judgments to ten years after their dates, was never held to operate upon judgments rendered prior to that act.

The return of the Sheriff on the *scire facias* was *substantially* good ; and that is sufficient ; for according to *Rich. Prac. C. B.* 316. 430. and *Dalt. Sheriff*, 279. the law requires no *precise form* in the return of any officer.

The want of a replication to the plea of *non detinet* was unimportant. A special replication was not necessary ; a "*similiter*" being sufficient : and it has often been held in this

Court that the omission of a "*similiter*" is aided by verdict.(1)

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Saturday, November 26. The Judges pronounced their opinions.

Judge TUCKER. The appellant upon leave granted by the County Court of *K. W.* sued out a *scire facias*, to revive a former judgment, directed to the Sheriff of that County, in *October, 1792*; to which there was the return of *not found* made: a second *scire facias* was issued and returned in like manner; and judgment was thereupon entered at the rules in *March, 1793*. And that judgment became final (not being set aside, or pleaded to) at the succeeding Court in *May*. Upon a *supersedeas* to this judgment, the District Court of *K. and Q.* reversed the same, and remanded the cause to the County Court, with leave to the defendant to plead thereto.

I said, the ground upon which this judgment was reversed in the District Court, in which I then sat, was, that, by the 48th section of the District Court Law, which took effect *January 1st, 1793*, it is directed that no judgment shall be rendered on the return of two *nihils*, unless the defendant reside in the District, or be absent from the Commonwealth; which regulation, it was supposed, extended to the County Courts, under the general provision in the County Court Law, that their proceedings, where not otherwise directed, shall conform, as near as may be, to the proceedings and practice of the District Courts. But, I have since discovered a similar clause in the County Court Law, sect. 30.(a) and, by the last section of that act, its commencement was postponed to the first of *May, 1793*. The office judgment was entered in *March*, and, there being no motion to set it aside at the next term, it was final thereafter.

(a) Rev.
Code, 1 vol. p.
89.

(1) See *Brewer v. Tarpley*, 1 *Wagh.* 363.

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A second judgment having been rendered in favour of the appellants, and that judgment also reversed by the District Court, from which last judgment of reversal, there is an appeal to this Court, a question arises whether this Court can now correct the first judgment of the District Court, reversing that of the County Court upon the return of two *nilis*, on the grounds before mentioned, or not. And I am of opinion that we may. For, although where a judgment of reversal puts an end to the question of right between the parties, or to the action, such judgment (being in its nature final) cannot be disturbed, or inquired into in a collateral way, but remains in full force, unless reversed in this Court, upon an appeal, writ of error, or *supersedeas*; yet, where such judgment of reversal neither determines the RIGHT in question, nor the ACTION, but merely directs a *new trial*, or *new pleadings*, for some error or omission therein, the whole of the proceedings (until a judgment in its nature final) are so far *in FIERI*, as that this Court may take notice of the first error, wherever it may happen: as appears from the cases of *Robinson v. Gains*, 3 Call, 243. and *Biggers v. Alderson*, 1 Hen. & Munf. 54. and *Fisher's Executors v. Duncan and Turnbull*, *ibid.* 574, 577.

Judges ROANE and FLEMING were of the same opinion.

Both the judgments of the District Court and the latter judgment of the County Court, were unanimously REVERSED, and the first judgment of the County Court affirmed, with damages according to law, from the date of the first writ of *supersedeas*.

Wingfield against Crenshaw.

Wednesday,
November 9.

THIS was an appeal from a judgment of the District Court of *Richmond*, reversing an order of the County Court of *Hanover*, by which leave was given to the appellant to erect a water grist-mill.

A *supersedeas*, to a judgment of a County Court granting leave to erect a mill, will not lie in behalf of a person, who may be interested, but whose name does not appear, as a party, in the record of the County Court.

Thomas Crenshaw presented a petition to the District Court of *Richmond*, stating that on the 25th of *May*, 1803, *William Wingfield* made application to the Court of *Hanover* County for leave to erect a grist-mill, on the south branch of *Pamunky* river, which after the usual proceedings was granted, accordingly, at the *August* session of the said Court, in 1803; *Charles Crenshaw*, who owned the acre of land on which *Wingfield* wished to abut his dam, personally appearing in Court and consenting thereto. That the petitioner was materially interested in preventing such order, being the owner of an ancient mill lower down the stream, and had, long before the said *Wingfield's* application, applied to the Court for leave to raise his dam; which motion was not granted; not because it was deemed unreasonable, but because the Court were of opinion, that the mill having been erected before the year 1748, he might raise his dam without any order of Court. In consequence of this opinion, the petitioner had incurred great expense in raising the works of his mill, and was about to complete the same; but being advised that it was doubtful whether he ought not to obtain leave of the Court for that purpose, he again applied, on the 25th of *May*, 1803, being the same day on which *Wingfield* made his first application, but previous thereto. That the Deputy-Sheriff of the County, executed the inquest in *Wingfield's* case; but could not be prevailed on to do it in the case of the petitioner, who was prepared to oppose the granting of leave to *Wingfield* to build his mill; but *Charles Crenshaw*, the person summoned to contest the building of the said mill, having consented thereto, leave was immediately given without the knowledge of the petitioner. That if the said *Wingfield's* mill

Such person should make himself a party to the contest before the final decision in the County Court, and then it is competent for him to carry the case to a superior tribunal.

A *supersedeas* is the proper remedy, only where the error is apparent on the face of the proceedings, and where the person seeking to reverse the judgment is a party in the Court below.

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should be built, the water from the petitioner's mill will flow back upon it, unless his dam should be lowered ; that the machinery of his mill must be rendered useless ; or that *Wingfield* will not be able to work his mill to advantage ; and that, as the petitioner conceives himself entitled to a prior and preferable right, he ought not to be compelled to reduce his dam. The prayer of the petition was for a *supersedeas*, and a reversal of the order of *Hanover County Court*.

The affidavits of *Thomas Crenshaw* and *Joel Crenshaw* were annexed to the petition, verifying, more in detail, the facts therein stated.

A *supersedeas* and *certiorari* were awarded by the District Court, on the 3d of *May*, 1806 ; and on the return of the latter, the proceedings of the County Court were brought up, shewing the application of *Wingfield*, to erect his mill, and the consent of *Charles Crenshaw* to the order made in relation thereto. *But in the proceedings for the erection of this mill, the name of THOMAS CRENSHAW no where appears.* There were, however, filed in the cause, sundry papers which proved the application of *Thomas Crenshaw*, on the 25th of *May*, 1803, for leave to raise his dam, and the proceedings thereon ; but neither the writ of *ad quod damnum* awarded at his instance, nor any inquest, was returned by the Sheriff ; also copies of the proceedings in a suit, then depending in the County Court of *Hanover*, brought by *William Wingfield*, against *Thomas Crenshaw*, for having raised his dam so as to overflow the mill-seat of the plaintiff.

The District Court reversed the order of the County Court, granting leave to *Wingfield* to erect his mill ; from which judgment an appeal was taken to this Court.

Hay, for the appellant, contended that the *supersedeas* had been improperly awarded by the District Court, in this case, being to a person who was not a party or privy to the controversy. The act of Assembly (a) clearly shews that the Legislature never contemplated the granting of a *su-*

(a) *Rev.*
Code, 1 vol.
p. 82.

persedeas to any person but the party aggrieved by the judgment of the Court below.

In *England*, the usual way of correcting the errors of inferior Courts, is by writ of *error*: appeals and writs of *supersedeas* are unknown there as practised under our laws: and in 2 *Bac. Abr. Gwil.* edit. 456. it is held that none but parties or privies can bring a writ of error. But if *appeal*, *writ of error*, and *supersedeas*, be all the same thing, under our laws, then *Thomas Crenshaw* might have taken an appeal from the judgment of the County Court, if he had made himself a party; and not having done so, he has no other remedy than that pointed out by the 7th section of the mill-law,^(a) by which a *person injured* may recover damages, *toties quoties*, for any injuries not foreseen by the Jury.

In this case, *Charles Crenshaw*, the party to the record, consented to the erection of the mill. It would be attended with serious inconveniences, if any other person not a party should be permitted to interpose. Thus a person might be put to the expense of erecting a mill; and even against the consent of the only interested person, it might be rendered nugatory. If *Thomas Crenshaw* had a right to obtain a *supersedeas*, any other citizen might do it, within the limitation allowed by law.

A case may be supposed by the counsel on the other side, where the Jury might find that the water would overflow the mansion-house, garden, &c. of another, (which is not authorised by law,) and still the Court might give leave to build the mill. In such a case, it may be asked, what can be done? The answer is; the party injured should apply to the Court, and move to rescind the order, on the ground of a violation of the law; and if the Court refused to do it, an appeal might be taken. Or, he might apply to the Court of Chancery, as was done in the late case of *Shepherd v. Austin*; and the Chancellor would appoint commissioners to pull the dam down.

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(a) *Rev*
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p. 198.

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(a) 2 Wash.
162.

(b) 2 Call,
276.

(c) 1 Hen. &
Munf. 404.

None of the cases heretofore decided on the subject of mills, have any application to the case now before the Court. The case of *Lee v. Turberville*,^(a) affords no argument to either party. The same objection was made in that case as in this ; but the Court suspended their opinion on the point of law, till the evidence was gone through, and then decided, *on the evidence*, without entering into an inquiry as to the question of law. The next case, that of *Mayo v. Clarke*,^(b) is still less entitled to consideration ; it decides nothing. In the case originally depending in the County Court they were both parties.

But the case of *Sayre v. Grymes*^(c) is a leading case, and decisive of the present question. The Court there decided that *Grymes* should not have a *supersedeas*, because he was not a party to the order which he sought to reverse.

Wickham, for the appellee. There are two classes of cases which may be brought to this Court, by *appeal*, *writ of error*, and *supersedeas*. *First*. Actions at common law ; in all which there are parties plaintiffs and defendants ; and in which it is admitted, that an *appeal*, *writ of error*, or *supersedeas*, can only lie for a person who is a party. Another class depends on the extraordinary jurisdiction of the Courts of Common Law, given by our own statutes, and of which the decisions in *England* furnish a prototype. These relate to mills, wills, roads and letters of administration. In all those cases any person, concerned in interest, though not a party to the first proceedings, may obtain an appeal, writ of error, or *supersedeas*. This is the general position laid down by the act of Assembly. In all such cases, too, no parties are named in the commencement of the proceedings : it is sufficient to make a party, for a person to come in at any time and shew his interest. Can there be any doubt, but that in *England* a person concerned in interest may appeal from a decision of the Ecclesiastical Court, though not a party in the first instance ? So with respect to mills, roads, &c. there is no other criterion

than interest. On that point alone the decision of *Sayre v. Grymes* turned.

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Again, a man may erect a mill on his own land, and may not want an acre the property of another, condemned: still he must have an inquest, and *no party* would appear in opposition. The uniform practice of this country has been to consider every person as entitled to appeal, or to obtain a writ of error, or *supersedeas*, who had an interest in question concerning mills, wills, &c.

It may be said, that a *supersedeas* will only lie where there is error apparent on the face of the record; and some plausibility is given to the argument by the consideration that an attorney must subscribe a petition, stating the error in the proceedings, and that the *supersedeas* may be granted or not, at the discretion of the Court or Judge. This mode of removing a cause by a substantive writ of *supersedeas*, is peculiar to the laws of our own country; (a) but it surely will not be said that it excludes other writs of error, authorised by common law. Suppose the plaintiff be dead before judgment; or any other error *in fact* shall have occurred; will it be said that a writ of error *coram nobis*, will not lie? The Court, or Judge may doubt the fact, but is there any thing more easy than to establish it, in the first instance, by affidavit?

(a) *Rev.*
Code, 1 vol.
p. 82. s. 54.

In looking into the authorities, we find that there are writs of error *in fact*, as well as *law*. (b) All the books lay it down that, in *England*, a writ of error is granted *of course*. A *scire facias ad audiendum errores* is awarded, and the parties plead. This is intended not only to satisfy the Judge but the party. There is nothing in our law which binds the party down to errors in law. The first law of *Virginia* on this subject is to be found in *Purvis's Collection*, page 32. where nothing more was necessary than for the party to make it *probably* appear that there was error; and on giving security he was entitled to the writ.

(b) 2 *Bar.*
Abr. Guil.
edit. 473. tit.
Error, Let,
(F.)

In such cases as this, it is not necessary to spread the facts upon the record, because they are examinable in the

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appellate Court. On the same principle, a bill of exceptions will not lie; because the Judge is to decide upon the fact as well as the law.

If the doctrine contended for on the other side be correct, how easy would it be for persons to combine, and erect a mill, to the injury of another person *interested*, but *not a party* before the Court, and who would be barred of all redress.

But, it is said, a party interested may have an action for damages. Cases may occur, in which no action would lie. Suppose two persons contending for a mill-seat, and one should slip into Court, and get permission from a third person to build. For what would an action lie? Would the person thus taken by surprise be entitled to an action, because the other was preferred by the Court? Even in cases where an action might be sustained, as for erecting a mill to the annoyance of the neighbourhood, a man may have his garden overflowed, the air poisoned, &c. and he is to wait the slow process of the Court for damages; when, perhaps, after a recovery, the defendant may not be able to pay a cent!

The cases of *Lee v. Turberville*, *Mayo v. Clarke*, and *Sayre v. Grymes*, are relied upon as direct authorities in our favour. In *Lee v. Turberville*, it appears from the record that the name of one of the parties is not mentioned till after a judgment. *Turberville* never came into Court, till leave had been given to *Bushrod* to build his mill. An appeal was denied to *Turberville* on the ground of his being no party; but he obtained a *supersedeas*, and the first appearance of his interest was in the petition. The case of *Mayo v. Clarke*, was a *supersedeas* to an order of the County Court appointing a surveyor of a road as an existing one. The parties had been in controversy, whether a road should be stopped or not; the Court, without making any decision on that question, appointed a surveyor. *Mayo*, not being able to find any order of Court establishing the road, changed his battery and applied to this Court for a *supersedeas* to an order of the County Court appointing a surveyor to a road which never did exist. The

matter of error, in this case, must have arisen from the facts stated in the petition; for the record is silent as to the facts. The case of *Sayre v. Grymes* was decided, not on the ground that *Grymes* was no party but that he had no interest.

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The interest of the appellee, in this case, as stated in the petition and supported by *affidavits*, is apparent. 1. The dam of *Wingfield* will overflow the road leading to *Crenshaw's* mill. 2. Both the mills cannot exist; and the question is, who shall have the preference. This is to be decided upon a great variety of circumstances. Our order for an inquest was first in point of time, and the Court ought to have made no decision till both inquests were returned. According to principle and practice both, we have a right to be heard.

Tuesday, November 22. The Judges delivered their opinions.

Judge TUCKER. *Wingfield* had obtained an order for erecting a mill; to which *Crenshaw*, upon a petition preferred to the *Richmond* District Court, obtained a writ of SUPERSEDEAS; and the same was reversed by the District Court. *Crenshaw's* name does not appear in any part of the record of the proceedings of the County Court: and the sole question now before this Court is, whether the writ of SUPERSEDEAS, was rightly awarded by the District Court.

The District Court law (a) expressly allows an appeal from the judgment or sentence of a County Court, in all contests concerning mills:—the 55th section of the act also allows a writ of error or *supersedeas*, to a judgment of the County Court, where the same is of the value of ten pounds, or one thousand pounds of tobacco; the party praying and obtaining the same, entering into bond with security, as the law directs.

(a) Rev.
Code, 1 vol. c.
66. s. 53.

By the common law a writ of error is grantable in all cases, *ex debito justitiæ*, except in treason and felony; so resolved by ten Judges in *Paty's* case. (b) Our law limits the writ to such personal actions, as are of the value

(b) 2 Salk.
504.

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118.(b) 2 Wash.
163. Lee v.
Turberville.(c) 2 Saund.
46. note 6.

of ten pounds, leaving the right as at common law, in real and mixed actions. A *supersedeas* in *England* is more by an auxiliary process, and so it is in some instances in this country, as was said by the late President of this Court in the case of *White v. Jones*. (a) But, in practice it seems to be a substitute for the writ of error of which there are few or no instances in *Virginia*. (b) None but parties or privies to the record can maintain a writ of error, in general, though a reversioner, or remainderman may in some cases. (c) The same rule seems applicable to the writ of *supersedeas* from the general analogy between them.

APPEALS in *civil* cases are altogether unknown at common law. There is therefore not the same analogy between an *appeal* and a *supersedeas*, that there is between a writ of error and a *supersedeas*. The object of the appeal is indeed the correction of error, as well as it is the object of the writ of error; but the one being a mode of proceeding at common law, and the other by the civil law, or by statute, there exists not such a relation between them, as that the one may be regulated according to the mode to be observed in prosecuting the other. One of the most prominent differences between an appeal and a writ of error is, that the former must be prayed and allowed in the court, whose sentence or decree is sought to be corrected; unless where by some special provision in a statute, further time is allowed the party. The latter being a writ of RIGHT, and grantable *ex debito justitiæ*, may by the common law, be sued out without leave of the Court, unless barred by the statute of limitation. This distinction will be found to run through the cases which arise under our statutes allowing an appeal or writ of error. If in a *common law* case, the party prays an appeal in Court, but not being able to give security within the time required by law, he loses the benefit of his appeal; still he may have recourse to his writ of error or *supersedeas*: because the former is the common law remedy in all cases where it is not expressly taken away by statute; and the latter is in ordinary cases a substitute for it in this country, under the laws of the Com;

monwealth, and the practice of Courts. But if, in a case not at *common law*, an appeal be allowed by the terms of a statute, and the appeal be prayed and refused, it would seem to me that the proper course would be to apply for a *mandamus* to the Court to allow the appeal; because, in such a case, no writ of error lies; or, if the appeal be not prayed at the time, that the party grieved may, upon application to a Superior Court of general jurisdiction at common law, (or to the Court of Chancery,) according to the nature of the case, obtain a writ of *CERTIORARI*, according to the distinction taken by Lord Ch. J. *Holt*, in 1 *Salk.* 144. and 263.(a) that wherever a *new* jurisdiction is created by act of Parliament, and the Court or Judge that exercises this jurisdiction, acts as a Court of RECORD, according to the course of the common LAW, a writ of ERROR lies on their judgments: but where they act in a summary method, or in a new course DIFFERENT from the common law, a writ of error does not lie, but a *certiorari*.(b) In addition to this authority, which appears to me to be expressly in point, I shall begleave to refer to 1 Lord *Raym.* 580. 1 *Burr.* 377. 2 *Burr.* 1040. 3 *Burr.* 1458. 4 *Burr.* 2244. 1 *Black. Rep.* 231. *Cowper*, 458. 7 *Term Rep.* 373. and 2 *Saund.* 101. a. as also, to what I have had occasion to say in this Court on a former occasion, in the case of *Coopers v. Saunders*, 1 *Hen. & Munf.* 420. *Long's case*.(c) cited by Lord Ch. J. *Holt*, 12 *Mod.* 390.(d) deserves notice. He was found guilty of felony, in the Court of the City of *Norwich*, and burnt in the hand; and held a writ of error would not lie, because no judgment of attainder, but that it might be removed by *certiorari*; and so it was: and, for faults in the conviction, quashed, and the party restored to his goods and chattels. In the present case I do not mean to give any opinion whether the party obtaining the writ of *supersedeas*, would have obtained a *certiorari*, inasmuch as his name is not in the record; nor do I mean to point out any other remedy (though I think he certainly was not without a proper one) adapted to the nature of his case.

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(a) *Green.*
writ v. Burr.
well.

(b) *Comyns*
Rep. 80. S. P.

(c) 3 *Cro.* or
Cro. Eliz.
489.

(d) In the
case of *Doo-*
tor Grenville
v. The Col-
lege of Phy-
sicians.

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162.

But it is proper to consider this subject in relation to several cases which have occurred in this Court.

In the case of *Lee v. Turberville*, (a) an appeal from the sentence of the County Court was prayed but *refused*. The District Court granted a *supersedeas*, and the objection to that mode of removing the cause was taken in this Court: it does not appear that any opinion was given by the Court upon that point; they reversed the judgment of the District Court, which they ought to have done, if the *supersedeas* was not properly awarded, according to the decision of this Court in *Coopers v. Saunders*; but, instead of dismissing the writ of *supersedeas*, as was done in the last mentioned case, as to the appeal, they affirmed the judgment of the County Court *upon the evidence*. This certainly appears very like an approbation of the conduct of the District Court in *awarding* the writ of *supersedeas*; though it erred upon the merits.

(b) 2 Call,
976.

In the case of *Mayo v. Clarke*, (b) *Mayo* had petitioned the District Court of *Richmond*, for a writ of *supersedeas* to an order of *Powhatan* County Court for altering a road, which the District Court refused. Mr. *Randolph* moved for a *mandamus* to the District Court to compel them to grant the *supersedeas*. The Court informed him that a *mandamus* was not a proper remedy. I think it might have been added that this Court has *no power* to grant a writ of *mandamus*, that power being expressly reserved to the General Court. *Rev. Code*, 1 vol. c. 65. s. 4. Mr. *Randolph* then moved for a *supersedeas*, which was granted, and the judgment of the District Court reversed, *November 18, 1803*.

(c) 1 Call,
495.

Another case, *Noel v. Sale*, (c) was where an appeal had been prayed and allowed from the sentence of the County Court of *Essex*, to the District Court, where the same was affirmed. To that judgment *Noel* obtained a writ of *supersedeas* from this Court, and the judgment was affirmed here. All these cases are in principle expressly contrary to the conclusions which would seem inevitably to follow, from the distinction taken by Lord Ch. J. *Holt*, in the cases before cited, and uniformly acted upon in *England*, from

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whence our rules of jurisprudence in cases not provided for by statute are uniformly supposed to be borrowed. For in the first case, the writ of *supersedeas* was granted to the judgment of a *new* Court not proceeding in that instance, according to the rules of the common law; and in the two last the same writs were awarded from *this* Court to the District Court. But this Court can only grant writs of *error* and *supersedeas* upon the *same principles* as the District Courts can grant them to the County Courts. Consequently, if the District Court could not award a *supersedeas* in a mill-case to the County Courts, neither could *this* Court to the District Court. After the case of *Lee v. Turberville* had been solemnly argued upon that very point, it seems difficult to suppose the Court did not recollect it, when the case of *Noel v. Sale* occurred, not four years after, and without any change of the Judges.

But a more apposite case to the present, may, I think, be found in 1 *Hen. & Munf. Rep.* 404.(a) In that case Mr. Grymes had obtained a writ of *supersedeas* from the District Court of K. and Q. to an order of *Middlesex* Court, granting administration of the estate of *P. L. Grymes, Esq.* with the will annexed, to Mr. *Sayre*. Mr. *Grymes's* name did not appear, in any part of the *record*. So that it did not appear to this Court, that he was either a party, privy, or in any wise *interested* in the grant of administration: and for that reason, this Court was of opinion that the writ of *supersedeas* should be *quashed* as improvidently granted. The two cases are perfectly alike upon this point. And therefore, without giving any opinion upon the general question, I am of opinion that the writ of *supersedeas* ought to be quashed as improvidently granted.

(a) *Sayre v. Grymes.*

Judge ROANE. Two questions occur in the case before us: 1st. Whether the appellee is a *party* competent to obtain a *supersedeas* in this case; and 2dly. Whether a *supersedeas* is a proper remedy, there being no error apparent on the record; whatever error may exist being *dehors* thereto, and arising out of the *testimony* upon which the judgment was

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(a) Rev.
Code, 1 vol.
p. 82. s. 54.

founded. As to the first question, it is provided that the "*party*" praying a *supersedeas*, shall petition the District Court, &c. (a) This term *party* is far more specific than the word *person* used in the preceding section. The words of that section are, "where any PERSON or persons, &c. shall think themselves aggrieved, &c. or where the CONTEST shall be concerning mills, roads, &c. *such person* may enter an appeal from the judgment or sentence," &c. Now this word *person* has been always construed to mean a person *party to the contest or the judgment*; and that construction is rendered more proper as to the case in question by the use of the word *party*: but the word "*contest*" puts it beyond controversy, that there can only be an appeal in the case of mills, &c. where there has been a contest; and that in favour of one of the parties to the controversy. On this ground the opinion of this Court went, in the case of *Sayre v. Grymes*, and in several other cases. In the case before us it was competent to *any person interested* in defeating the application for the mill, (and not *those only* who are returned by the inquisition as interested,) to contest the motion *in the Court below*; which having done, he was thereby made competent to carry the case to a superior tribunal. I infer this because it is provided that if it appears by the inquest, or other evidence, that the mansion-house, &c. of any person will be taken from him, leave shall not be given; or if, *all circumstances weighed*, it be not deemed reasonable to give the leave, such leave shall be withheld; but this provision would be a dead letter, if those whose interests and situation enable them to know and exhibit the facts were not permitted to come forward and establish them.

The case before us (as made by the *affidavits*) exhibits a strong ground of objection to the mill in controversy; but, on this point, this case must stand or fall by the general principle; and, however competent it may be for a party obtaining leave to build a mill, to hold himself in readiness to defend his judgment against the attacks of those who are *parties* to the proceeding, it would be pro-

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ductive of vast injury and inconvenience to hold him so liable in relation to, perhaps, hundreds of citizens, who may think themselves even slightly or collaterally interested. Such a construction would place the applicants for mills on a very uncertain footing; whereas a contrary construction would generally be productive of no inconvenience, as the proceedings in the case of mills are of public notoriety, and all persons interested have consequently an early opportunity to come forward and make known their objections; or, if this be not done, their action for damages for injuries is expressly reserved to them.

As to the 2d question, if the foregoing idea be correct, there is no absolute necessity for deciding it: but, as this subject has several times presented itself to the Court, it may be useful now to say something concerning it. I cannot find that this question has ever been decided by this Court. In the case of *Lee v. Turberville* the point was (expressly) left undecided: and in *Mayo v. Clarke*,^(a) the Court said there were sufficient grounds, UPON THE RECORD, for the District Court to award the writ of *supersedeas*. The case of *Noel v. Sale*^(b) exhibits no decision upon the subject, as that case was carried to the District Court by way of *appeal*, (and not *supersedeas*;) and this Court, on a *supersedeas*, affirmed the judgment of the District Court affirming that of the County Court, because *non constat* but that it appeared to the District Court, by the evidence properly introduced on the *appeal*, that there was irregularity or misconduct sufficient to warrant the judgment quashing the inquisition. (a) 3 Call, 339.

Taking up this, then, as an undecided question, the construction of the act in respect to writs of *supersedeas*, seems to be properly restricted by the requisition contained in it relative to the certificates of counsel; i. e. to errors apparent "in the proceedings." With respect to these, the counsel learned in the law are competent to pass their judgment: but the act could never have meant to assign to them the function of weighing testimony, and estimating

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credibility. This construction is also very reasonable. Where an *appeal* is taken, in such cases, and tried *immediately*, (as is the practice in the appellate Courts,) no injury can accrue to parties from the death or removal of witnesses : but, as a *supersedeas* may be had at *any time within five years*, it is evident that, if this remedy be construed to extend to cases involving *testimony*, the lapse of several years since the rendition of the judgment would produce great injuries arising from the causes aforesaid. I say nothing on the point whether a *writ of error* would lie in such case : while, on one hand, it would be equally liable to this last objection ; on the other, there is no expression in any statute restricting it to errors apparent in the proceedings only.

According to this construction, the parties have at least *one* mode by which the *whole* testimony may be re-examined by the Superior Court : but, in such case, the appeal must be taken *at once*, and speedily decided ; thereby steering clear of injuries arising from the loss of evidence : and, on the other hand, when a mode of appealing is to be resorted to, after the lapse of several years, and, perhaps, after deaths of the adverse witnesses, it is just that the only permissible ground of exception should permanently appear in the record.

On this ground, therefore, (without giving any opinion as to the competency of a WRIT OF ERROR *in point of fact* in the PRESENT case,) I conclude that a *supersedeas* is a proper mode of appealing in cases only where, *on the face of the record*, it appears that the proceedings are erroneous.

Judge FLEMING. It appearing that the appellant, *William Wingfield*, and *Charles Crenshaw* were the only parties before the County Court of *Hanover*, in the proceedings stated in the record, brought up by virtue of a *certiorari* issued from the Clerk's office of the District Court of *Richmond*, by order of the said Court, in which the name of *Thomas Crenshaw* is not mentioned ; it appears to me that a *super-*

sedes could not lie in his name, to the order of *Hanover* Court, giving *Wingfield* leave to build a mill according to the prayer of his petition. If the appellee is aggrieved by the order he may seek redress by another remedy.

I am therefore of opinion that the *supersedeas* ought to be quashed, and the judgment of the District Court reversed.

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Wright against Dawney.

Saturday,
November 26.

IN this case the Chancellor for the *Richmond* District, at a subsequent term, after the vacation in which he refused an appeal from his interlocutory decree between the same parties,^(a) granted an appeal under the act of Assembly.^(b)

Williams moved to dismiss this appeal as improvidently granted, saying the Chancellor had no right to allow it after the term at which the decree was entered.

Judge *TUCKER* said that, as to *final* decrees, the power of the Court ceased at the end of the term; but over *interlocutory* decrees it always continues; for the Chancellor may, at any subsequent term, set such decrees aside, and therefore may grant appeals from them.

The power of the Superior Courts of Chancery to grant appeals from interlocutory decrees, in certain cases, is not limited to the terms at which such decrees were rendered; but may be exercised at any subsequent term.

(a) 2 *Hen. & Munf.* p. 12.
(b) *Rev. Code*, 1 vol. c. 223. s. 1. p. 375.

Judge *ROANE* observed the great inconvenience which would result from the construction of the law contended for by the counsel of the appellee. This Court having decided that appeals from interlocutory decrees cannot be granted by the Chancellor in *vacation*, it might happen that the party aggrieved by a decree would be deprived of his appeal altogether, if it could not be allowed him at a subsequent term, since he might be absent when the decree was

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rendered, and know nothing of it until after the term. Such a construction should prevail as advances the object the Legislature had in view, which was the convenience of the people : and, moreover, no words exist in the act restricting the power of the Chancellor to the term when the interlocutory decree was entered.

Judge FLEMING was of the same opinion ; and the motion was unanimously overruled.

Monday,
November 28.

Moore against Chapman.

Trespass, assault and battery, and false imprisonment, will not lie against the plaintiff, for suing out a writ of *capias ad satisfaciendum*, and causing the defendant to be taken in execution, while he was attending Court as a witness, under the protection of a *subpoena*, although the debt for which the execution issued had been previously paid.

Nor can any action be sustained, as it seems, till the process of execution be quashed, or superseded.

THIS was a *supersedeas* to a judgment of the District Court held at *Haymarket*, reversing a judgment of the County Court of *Fairfax*.

Moore brought an action against *Chapman* in the County Court of *Fairfax* ; the declaration charges an assault, battery, and false imprisonment of the plaintiff by the defendant, on such a day, at the *Parish of Fairfax*, in the *County of Fairfax*. The defendant filed certain pleas, not in the record, (neither is the nature of them mentioned,) which, by consent, were afterwards withdrawn ; and, thereupon, he pleaded not guilty ; and, by *consent*, leave was granted him to give all matters in evidence at the trial that he could have specially pleaded. After which, the parties went to trial ; when a bill of exceptions was filed by the defendant's counsel ; stating that, on the trial, the *plaintiff* offered evidence to prove that, on the application of one *Willoughby Tebbs*, an execution was issued by the Clerk of *Dumfries D. C.* on behalf of the defendant *Chapman*, against the body of the plaintiff, for 37*l.* 2*s.* 7*d.* with interest thereon and costs, which execution was not directed to any Sheriff, but was put into the hands of the said de-

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defendant ; who, it was proved, had given the Clerk written instructions to issue the same ; that the said execution was thereafter delivered to the *Sheriff* of PRINCE WILLIAM COUNTY ; but, *by whom*, it was not served : and, further, that the plaintiff was a resident of *Fairfax* ever since and before the issuing the execution ; and that, “ *whilst he was sojourning for a time in the COUNTY of PRINCE WILLIAM, being then and there regularly summoned by subpoena to attend the Court of that County as a witness, the Sheriff of Prince William seized his body, and held him in custody for the space of ———, until he shewed that he was attending the County Court of P. W. on a summons, when he was immediately discharged:*” but that the said arrest and imprisonment was made without any direction of the *plaintiff* (it is supposed it should be the *defendant* in this action) other than before mentioned : and further, that the plaintiff’s counsel alleged, and gave evidence to prove that the *judgment*, upon which the execution was issued, had been paid and satisfied, by the plaintiff to *Tebbs*, to whom it was assigned. Whereupon the counsel for the defendant requested the opinion of the Court whether the evidence aforesaid was proper to be submitted to the Jury in support of the issue on the part of the plaintiff ; and whether the declaration was not too general, and should not have stated the nature of the action ; and whether the issuing of an execution from the District Court to ——— Sheriff, which was served by the Sheriff of *Prince William* County, would support an action of trespass for a false imprisonment. The Court instructed the Jury, that, if they should find from the evidence that the judgment was paid before the issuing of the execution, then the action aforesaid, *on the declaration aforesaid*, could be well sustained, *on the evidence aforesaid*. The bill of exceptions was sealed. There was a verdict and judgment for 60*l.* damages, which was afterwards reversed by the District Court ; to which judgment of reversal a writ of *supersedeas* was granted by a Judge of this Court.

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(a) 2 IV. Black.
Rep. 1055.
Rafael v. Ve-
relst.

Randolph, for the plaintiff in error. The action was properly instituted against *Chapman*. He ordered the execution in his own name, and put it into the hands of *Tebbs*. It was by his procurement that the imprisonment happened; and therefore he is responsible. (a)

Although an action for false imprisonment might have been proper, yet trespass, assault and battery, and false imprisonment, was equally so. The payment of the judgment to *Tebbs*, to whom it had been assigned, operated as a discharge, and as if there had been no execution at all. An action for false imprisonment lies, wherever a person is arrested either by void or irregular process; or where the Court has no jurisdiction, or exceeds, or does not pursue

(b) *Exp. N.P.* it. (b)
328, 330.

Botts, for the defendant in error, relied on the following points; 1. That, if a plaintiff in a judgment, after payment of the same, cause an execution to be levied, no action will lie for such vexation; but the redress will be in a summary way, before the Court whose process is abused, or by injunction. (c) Suppose a person, thinking he had a right of action, should bring a suit, and on the trial, the Jury should find for the defendant; would it be said, that he was liable to an action for the arrest? How much stronger is the case where a party has the judgment of a Court! If an action will lie in this case, it will lie in every one where the defendant is held to bail, and the plaintiff fails in his suit.

(c) 1 Bac.
Abr. Grail. ed.
309. tit. Audi-
ta *Querela*,
let. B. note at
bottom, cites
4 Mod. 14.
*Baugh v. Kil-
lingworth*. (1)

2. That, in a case like this, a general declaration in trespass, assault and battery, and false imprisonment, can-

(1) In the late editions of *Bacon's Abridgment* there is a *querre* whether a special action on the case would not lie? The above *dictum* is taken from the argument of *Tremaine*, Sergeant, in the case of *Baugh v. Killingworth*; and although the reporter says, "For these reasons the judgment was stayed," yet the case only proves, that an action on the case will not lie against a person for suing another in the SHERIFF's Court, in London, for rent due in the country. To support the doctrine laid down by Sergeant *Tremaine*, a reference is made to *Cro. Jac.* 133. *Lady Waterhouse v. Bowde*; but that case only establishes the position, that an action will not lie for suing in a proper Court, though there be no cause of action.

not answer the only end of one, to apprise the opposite party that a question of *payment* was to be litigated ; though such declaration might well put him off his guard, by removing all suspicion of such question, and by alluring him into exclusive preparation for another.

In order to connect the Sheriff with the plaintiff, the whole proceedings should have been stated. On the same principle, it was decided in the case of *Averton and wife v. Hudson*,^(a) that *general indebitatus assumpsit* would not lie against the High Sheriff for money received by his deputy ; but that the declaration should have contained a specification of the fact. The same principle, as to the contents of a declaration, is laid down by the President in delivering his opinion in the case of *Chichester v. Vass*.^(b) If the object of a declaration be to apprise the defendant of the cause of action, it would be as well to have no declaration, as such an one as this. Wherever there is a special contract, or a special cause of action, the plaintiff must give notice of it in his declaration ; and can never be permitted to turn the generality of the count into a surprise upon the defendant.^(c)

3. That whatever injury was proved, was not sustained *immediately* by the defendant's act of issuing the execution, or delivering it to *Tebbs*, or to the Sheriff, (if he did so deliver it to either,) but the sole injury was from the seizure of the plaintiff's person by the officer, without any new act of the defendant's ; which injury was consequential to the said issuing or delivery, so as to fit the remedy of an action of trespass on the case.^(d)

4. That a writ emanating from a Court of competent jurisdiction, cannot be the medium of a trespass, assault and battery, and false imprisonment, with force and arms.^(e)

5. That, upon a fair construction of the opinion of the Court, nothing was referred to the Jury but the question of payment ; on proof of which, according to that instruction, the action could be well sustained on the evidence given ; thereby discharging the Jury from a consideration of the

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(a) 2 Wash
179.

(b) 1 Co.
104.

(c) Per Lord
Mansfield, in
Weston v.
Downes,
Doug. 23, 24
and in *Long-*
chump v. Ken-
ny, *Doug* 138.

(d) *Bull. N.*
P. 12.

(e) 3 Term
Rep. 183.
Belk v.
Broadbent.

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weight or sufficiency of the evidence touching the issuing and levying of the execution; and precluding them from the inquiry whether the execution went out of the hands of the defendant by design, fraud, or accident; since, without evidence of either, the action, in the opinion of the Court, could be supported. That the Court cannot instruct the Jury on the weight or sufficiency of the evidence, is a position which has been established by many decisions. (a)

(a) 1 Wash.
90. in the case
of *Ross v. Gill*,
&c. *Ibid.* 203.
Keel and Ro-
berts v. Her-
bert. 1 Hen. &
Munf. 563.
Fisher's Exe-
cutor v. Dun-
can and Turn-
bull.

Friday, December 2. Judge TUCKER, after stating the case, proceeded:

The consent entered in the County Court, that the defendant might give in evidence upon the trial of the issue joined, any thing which he could have specially pleaded, takes away all objection to his not having pleaded a regular judgment of the District Court, as a justification of the arrest of the defendant upon the execution: an omission which otherwise might have been fatal. The plaintiff's own evidence, however, as stated in the bill of exceptions, shews that there had been a *regular judgment* of a Court of Record; and by the act of 1792, (b) the practice of issuing executions, without being directed to any Sheriff, (however irregular at common law,) has received a sanction which nothing but an express legislative act would ever have obtained for it in a Court of Common Law. Having thus disposed of these points, it remains to consider,

(a) *Rev. Code*,
1 vol. c. 76. s.
39.

1. Whether the plaintiff's action, under the circumstances of this case, will lie? And there can be no doubt, that, where a party is taken in custody upon a process, which is for any reason *void*; as if a *capias ad satisfaciendum* be sued out against an executor or administrator, on a judgment obtained against him for a debt due by his testator, without establishing a *devastavit*; such writ is merely void, and an action of trespass and false imprisonment lies against the plaintiff suing out the writ, though not

against the Sheriff.(a) So, if a term intervene between the *teste* and the return of a *capias*.(b) But, it would seem that, where the process is *irregular* only, the plaintiff, at whose suit the arrest is made, is not liable to an action of trespass, until the writ is *superseded*. For, per *Buller*, Judge, *till then*, it is a *justification*.(c) And the same doctrine seems to be recognised in 2 *Blacks. Rep.* 846.(d) 867.(e) 1191.(f) 1194. 3 *Wilson*, 342.(d) 345. 3 *Wilson*, 376.(e) 1 *Strange*, 509.(g) But, in the case before us, the process was not void, for there is shewn to have been a judgment upon which it was founded, which is not alleged to have been unduly obtained, or reversed. The defendant, if he had paid the debt, ought, according to the authority of Judge *Buller*, to have applied to the District Court to supersede, or quash the second execution, thus vexatiously sued out, before he brought his action. And there seems to me to be very strong reasons in favour of this preliminary course of proceeding. For, otherwise, the satisfaction and discharge of every debt for which a judgment is recovered in the highest Court of Record in the country, may be *collaterally* inquired into in any inferior Court in the country. Whereas it belongs, *exclusively*, I conceive, to the Court where the judgment is recovered to determine whether that judgment hath been actually satisfied and discharged. A contrary practice would introduce numberless inconveniences, since every execution issued from one Court, and served, may be the parent of a dozen other suits in other Courts. And there is an additional reason for this construction given by *Ld. Ch. J. De Grey*. "Trespass, (by the way,) says his Lordship, must be certain, and either an injury or not, at the time of the act done. It cannot depend on the SUBSEQUENT discretion of the Court, in GRANTING or REFUSING the discharge."(h) Now suppose the District Court of *Dumfries*, on motion to quash this execution on the ground that the judgment was discharged, had REFUSED, as it might, if not satisfied with the reasons given for quashing it,

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(a) 2 *Blacks. Rep.* 866.
(b) *Barker v. Braham*, 3 *Wilson*, 368. S. C. 4 *Blacks. Rep.* 1192, 1193, 1194.
(c) *Cameron v. Lightfoot*. See also 3 *T. R.* 183. *Belk v. Broadbent & Wife*.
(d) 2 *Blacks. Rep.* 845. *Parsons v. Lloyd*. 3 *Wilson*, 341. S. C.
(e) *Doug. 652. Tarlton v. Fisher*.
(f) *Parsons v. Lloyd*.
(g) *Barker's Administrator v. Braham*, &c.
(h) *Cameron v. Lightfoot*.
(i) *Philips v. Biren*.

(h) 2 *Blacks. Rep.* 1193. in the case of *Cameron v. Lightfoot*.

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could the defendant have maintained this action? And, since it still *may be* in the discretion of that Court to quash it or not, for any thing that appears in this bill of exceptions, could this action be maintained without shewing this? And, if it could not, have not the Court erred in instructing the Jury that, if they were satisfied of the payment, the action *could well be sustained* by the evidence stated in the bill of exceptions? I am clearly of that opinion, not only for the preceding reasons, but because this Court have repeatedly declared it to be error if the Court undertake to instruct the Jury as to the weight, or sufficiency of the evidence offered to them.(a)

(a) *Fisher's*
Executors v.
Duncan and
Turnbull. 1
Hen. & Munf.
577. vide also
1 Wash. 90.
203.

A second error appears to me in this, the assault and false imprisonment are stated in the declaration to have been committed at the parish of *Fairfax*, in the *County of Fairfax*. The evidence execepted to, is an execution issuing from the District Court of *Dumfries*, which was served at *Prince William Court*, where the defendant was attending as a witness, and while he was sojourning (as he expresses it) for a time in the *County of Prince William*. Now, although trespass is a transitory action, like debt upon a bond, yet if it *appear* from the evidence that the *trespass* was *committed*, in the one case, or the *bond* *executed* in the other, in a foreign place or jurisdiction, there must be an allegation in the declaration, that it was *so* executed, or so committed, at the place to which the evidence necessarily points, to wit, in the *County*, or country, in which the suit is brought; under a *videlicet*. This is necessary in order to a proper *venire*. It is necessary also to prevent a multiplicity of suits. For, if there had been no exception taken to this testimony, how could a recovery in this action be pleaded in bar of *any* future action brought in twenty other Courts for the same cause?

A third ground upon which I conceive the County Court erred, is, that supposing the execution not to have been previously satisfied, the taking him into custody upon that execution whilst he was attending as a witness at the Coun-

ty Court of *Prince William*, and detaining him in custody until he shewed that he was there attending on a summons, was not a sufficient cause to support this action of trespass, assault and battery, and false imprisonment, as was decided in *Cameron v. Lightfoot*,^(a) where this point was fully considered; and the Court decided that the writ was not *void*, nor the arrest *illegal*, but *improperly timed*, only. And the Court there said, that the privilege of the witness was not considered as the privilege of the *person* attending, but of the Court which he attends.

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(a) 2 *Black's*
Rep. 1190.

I have taken no notice of the evidence which might have been given to the Jury, except what is stated in the bill of exceptions; the mass of papers copied at the end of the record, as has been more than once decided, though certified by the Clerk to have been filed in the cause, not being properly before this Court.

For these reasons I am of opinion that the judgment of the District Court should be affirmed.

Judge ROANE said, that he could see no error in the judgment of the District Court; and was in favour of affirming it.

Judge FLEMING was of the same opinion.

Digges against Norris.

In an action of assault and battery, after a general verdict for the plaintiff, on the pleas of "not guilty," and "son assault demesne," judgment ought not to be arrested on the ground that the time was left blank in the declaration.

After verdict, the damages having been left blank in the declaration, the Court will inspect the writ and supply them from it.


THIS was an action of assault and battery, in which the time and the DAMAGES were left blank in the declaration; and the pleas were "not guilty," and "son assault demesne." After a general verdict for the plaintiff for 300 dollars damages, the defendant moved in arrest of judgment, assigning the blanks in the declaration as grounds of arrest. The District Court overruled the motion, and gave judgment for the plaintiff; whereupon the defendant appealed to this court. A copy of the writ (in which the damages were laid at 1,000 dollars) was inserted in the record by the Clerk of the District Court, though no entry was made of *oyer* of the writ, nor any order of the Court for its insertion.

Botts, for the appellee, moved to take up this as a delay case, to which the Court agreed, and unanimously affirmed the judgment.

GENERAL RULES AND POINTS OF
PRACTICE.

Regula Generalis.—Wednesday, October 5th, 1808.

THE suits directed to be placed at the end of the docket, (pursuant to the rule of the 3d of June, 1808,) are to be put after the new causes standing on the docket at the time of postponement.



Thursday, October 6th, 1808.

Craigen et al. against Thorn et al.

THE transcript of the record, in this case, not having been brought up within two terms after the appeal granted, the appellees' counsel moved to dismiss the appeal ; which was opposed by the counsel for the appellants, on the ground that, although he had used every exertion to obtain the necessary information from his client as to the causes which produced the delay in sending up the record, yet his remote situation had prevented him from acquiring the information sought, through the medium of the post-office.

Per Curiam. Let the appeal stand dismissed, with costs, unless the appellants shew cause to the contrary on or before the 2d day of December.

Afterwards (on the 8th of November) cause was shewn against dismissing the appeal ; the above order *nisi* was set aside, and the appeal placed on the docket.

Regula Generalis.—Friday, October 7th, 1808.

SUITS, in which process is necessary to bring the proper parties before the Court, will not be taken up in course ; but be permitted to lie uncalled, and to retain their stations on the docket.



Regula Generalis.—Same day.

PARTIES brought before the Court by process will be allowed till the Court next following that to which such process may be returnable, in order to prepare for a hearing.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

At the Term commencing in March, 1809.

IN THE THIRTY-THIRD YEAR OF THE COMMONWEALTH.

JUDGES, PETER LYONS, ESQUIRE, *President.*
WILLIAM FLEMING, ESQUIRE.
SPENCER ROANE, ESQUIRE.
ST. GEORGE TUCKER, ESQUIRE.

ATTORNEY-GENERAL,
PHILIP NORBORNE NICHOLAS, ESQUIRE.

Lomax *against* Hord.

*Wednesday,
March 8th,
1809.*

AFTER the decision of the cases of *Hord's Executrix v. Dishman*,^(a) and *Moore's Administrator v. Dawney, &c.*^(b) in the former of which it was held that the "*quod cum*," or "*whereas*," in a declaration in trespass, which continues by way of recital to the end, is fatal after a *general demurrer*, It is now settled that a declaration in trespass, or *case* for a tort, which begins "for that *whereas*," &c. and continues by way of recital to the end, is insufficient; and that such error is fatal even after verdict or *general demurrer*.

(a) 2 Hen. & Munf. 595. (b) *Ante*, p.

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and in the latter, that the same error is fatal after a *verdict*, a similar exception was taken to the declaration in *this cause*, during the same term. It was an action on the case, brought in the District Court of *Fredericksburg*, by the appellant, *Lomax*, against the appellee, *Hord*, for champerty. There were two counts in the declaration; the first of which states, in substance, that the defendant procured a certain *Gawin Corbin* to institute a suit against the plaintiff in the District Court of *King and Queen*, to recover a tract of land; and that the defendant prosecuted the suit at his own costs, upon an agreement that he should have a part of the land; the second count merely varied the mode of stating the cause of action; but both counts commenced with a "*whereas*," and continued, by way of recital, to the end of the declaration. *Plea*, "Not guilty." *Verdict*, 600*l.* damages, subject to the opinion of the Court upon a demurrer to evidence, offered by the defendant, and which the plaintiff refused to join till compelled by the Court.

The plaintiff having introduced written and parol evidence proving the agency of *Hord* in the investigation of the title, his payment of officers' fees, and that an agreement was actually signed between *Corbin* and *Hord*, by which the latter was to have one-half the land, but that, on receiving the advice of counsel that it would ruin him, if he persisted, he declared that he had *dropped the prosecution*; and the plaintiff having proved further the recovery of the land by *Corbin*, it appeared in evidence, from answers made by the plaintiff's witness to interrogatories propounded by the defendant, that, when the suit was brought, he (the witness) was counsel for *Corbin*, and received his instructions and fee from *Corbin* himself, who attended the surveys, the Court, and the progress of the cause in person, and that he never had the smallest reason to believe that the defendant, directly or indirectly, concerned himself in the prosecution of the suit; but that, on the contrary, from every circumstance which fell under his notice, he believed him wholly unconcerned; the said witness having, about

three or four years before the suit was brought, advised him against it, and represented his danger ; at which time, as the witness thought, the defendant seemed determined, and declared his intention not to intermeddle further with it. At this stage of the trial, the demurrer was offered by the defendant. The Court compelled the plaintiff to join ; and, on argument, adjudged the law to be for the defendant ; from which judgment the plaintiff appealed to this Court.

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LODGE
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The cause was very fully argued on the 28th of *November*, 1808, by *Wirt*, for the appellant, and by *Botts*, for the appellee, on the point, *whether the plaintiff, under the circumstances of this case, ought to have been compelled to join in demurrer* ; when *Botts*, in the conclusion of his argument, relied on the *quod cum* in the declaration, as decisive against the plaintiff ; even if the *merits*, and the question relative to the *demurrer* were considered to be against the defendant ; both of which points, he contended, were in his favour. But as no notice was taken of the point relative to the demurrer to evidence, in the judgment of the Court, we are reluctantly compelled, for the sake of brevity, to omit those valuable arguments.

[[*P*] Judge ROANE then suggested to the Court the propriety of reconsidering the point of the *quod cum*. He observed, that although the decisions of this Court were in strict conformity with the *British* authorities, yet, this being a point of practice, and not a rule of property ; and there having been, probably, a general misapprehension among the gentlemen of the bar, on this subject, it might be worthy of consideration, whether, in order to prevent mischief, the Courts, in this country, might not deviate from the *English* practice.]

The Court having consented to reconsider the point, it was argued by *Call*, for the appellant, and by *Warden*, for the appellee. But as the Court adjourned without coming

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(a) See note
(1) at the end
of the case.

to any decision, and the judgments in the case of *Hord's Executrix v. Dishman*, and *Moore's Administrator v. Dwayne*, &c. rendered at the same term, were not set aside, it might fairly be presumed that the judges were not disposed to change the rule.(a)

Call (as to the *quod cum* in the declaration) argued, that, according to the letter and spirit of our laws, which do not agree entirely with the *British* statutes on this subject, matters of form ought to be disregarded; that, as this question did not respect a rule of property, but a mere point of practice, it was but reasonable that we should conform to the spirit of our own laws, especially when we are about to make an interpretation on *them*, and the *English* Judges have declared that they would not extend the objection farther than it had been already carried. Our statutes have long provided, "that in all personal actions, where the declaration shall plainly set forth sufficient matter of substance for the Court to proceed upon the merits of the cause, the suit shall not abate for want of form."(b) Torture this question as you will, still it is but a mere matter of form. It is impossible to suppose, but that the defendant knew as well what charge he was to answer, as if there had been a positive averment. Again; our statute of *jeofails*(c) declares that judgment after verdict, shall not be stayed or arrested for "omitting the averment of any matter, without proving which, the Jury ought not to have given such a verdict." In this case, it is impossible that the Jury could have found for the plaintiff, unless they had been satisfied that the defendant *really* was concerned in the prosecution of the cause, though he had *apparently* withdrawn from it. The case seems to fall within the reason of the principle which makes a difference between a defective title, and a title defectively set forth.

(d) 2 Lord
Raym. 1413.

In the case of *Dobbs v. Edmunds*.(d) the Court declared, that "they would be bound by what had been already determined; but they should be very cautious of extending this exception after verdict further than it had been car-

"ried before." In the Common Pleas, in order to get rid of the objection, the Court will seize hold of the trifling circumstance that, according to the mode of declaring in that Court, the writ is recited in the commencement of the declaration ; and therefore it is held that what follows, makes the averment positive. But it is really difficult to perceive the distinction. Two thirds of the declarations in this State, will probably be found to contain this unfortunate *quod cum* ; and great mischief will ensue from an adherence to the decisions of the Court of *King's Bench* on this point. If the question had been asked the Legislature of *Virginia*, whether, when they passed the beneficial statute of *jeofails*, which was intended to protect verdicts against technical quibbles, they had an idea that such an objection as this could afterwards have been sustained, one and all would have said no.

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But, however correct the objection may be in *trespass*, it is not so in *case* as this action is ; and the Court will not carry the exception farther than it has been in *England*, but confine it to *trespass* only. Compare this with a common declaration in *indebitatus assumpsit*. You will find it is all recital there till you come to the breach ; when it is merely said, that the defendant refused to pay, &c. The cause of action is as much stated by way of recital, as in this case. There is a precedent, too, in 1 *Modern Entries*, 217, 218. and in 1 *Lilly's Entries*, 38. where the case is set out with a "*whereas*," and concludes exactly like this.

It is true that there are recent decisions of this Court against me ; but it never has been contended that a single decision shall invariably fix the rule. In *Jolliffe v. Hite*,^(a) Judge *Pendleton* says, "Uniformity in the decisions of this Court is important. We have, however, progressed but little from the commencement of our existence ; and if, in any instance, we should recently discover a mistake in a former decision, we should surely correct it, and not let the error go forth to our citizens as a governing rule of their conduct." The first case in which this question occurred, was *Ballard v. Leavell* ;^(b) and, on the

^(a) 1 *Call*, 328.

^(b) Nov. 1805, MS.

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(a) 2 Hen. 8
Munf. 423.
(b) Ibid. 595.
(c) Ante, p.
127.

point of the *quod cum*, the Court was equally divided. At the last term, the subject was reargued in *Taylor v. Rainbow*, (a) but the cause was decided on the form of the action. During the present term, in *Hord's Executrix v. Dishman*, (b) and *Moore's Administrator v. Dawney, &c.* (c) it has for the first time been unanimously decided that the *quod cum* is fatal.

Another reason why this exception should be disregarded, is, that in this country the writ is filed among the papers, and may be inspected by the Court, in the same manner as in the *Common Pleas* in *England*, where the *quod cum* is not held to be fatal. But in the Court of *King's Bench*, the writ is not filed. It emanates from a different Court; and if *oyer* be demanded, the plaintiff applies to the Court of Chancery, and gets a writ to suit his case. (d) Sometimes the Court of *King's Bench* will award a *certiorari*, to bring up the writ, for the information of the Court, when no diminution is suggested, as was done in the case last cited; and this Court may do it for the same purpose. All these cases prove, that where the writ emanates from the same Court, it is considered a part of the record; and, by looking at the indorsement, there will be found a positive affirmation,

(d) *Andrews*,
21. *Smith v.*
Reynolds.
Ibid. 282.
Goodright v.
Hodgson.
Cases temp.
Hardw. 110.
Franklyn v.
Reeves.

Warden, on the other side, referred to the several *British* statutes of *jeofails*, and contended that they went further in the protection of verdicts than our's; still the *quod cum* was held to be fatal. This was a good exception at common law, and might have been provided against by the Legislature; but, that not having been done, the Court must decide according to law. There is no averment in this declaration that the defendant had done *any thing*; it is mere recital from one end to the other. In case for slander, &c. the form commences with "*whereas*," as inducement to the action, and concludes with "*yet*," &c. stating *positively* what the defendant did. Would the "*whereas*" in such an action be good, without the conclusion? Surely not.

It is said, however, by *Mr. Call*, that this precedent is like the common one in *indebitatus assumpsit*. Not a declaration can be found in *assumpsit*, drawn by the most ignorant pleader, where the *quod cum* goes entirely through. After reciting the cause of action, they always conclude with a breach of promise, “yet the defendant,” &c. without which, it would be clearly bad.

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The law, on this point, has been fully settled. A number of cases exist both in *England* and in this Court, where the exception has been sustained; and if the Court were to decide otherwise now, instead of studying uniformity, they would study diversity. *Ballard v. Leavell*, *Taylor v. Rainbow*, *Hord v. Dishman*, and *Moore v. Dawney*, are all cases in point.

Wednesday, March 8th, 1809. The judgment of the District Court was unanimously AFFIRMED.(1)

(1) The judgment of the Court below having been given for the *defendant*, and this Court having merely *affirmed* it, without assigning any *reasons*, doubts existed as to the *grounds* of the decision; whether upon the *merits* or the *quod cum*, or upon both. To remove those doubts, the REPORTERS addressed a note to the JUDGES, stating the difficulty which had occurred; that frequent applications had been made to them, by gentlemen of the bar, to know whether the point was still open to discussion; (an opinion which had been entertained, from the circumstance that the Court permitted it to be *reargued*, in this case, *without coming to any direct decision on that very point*;) and that it was important to the profession to receive the earliest information, how far the law had been settled. The Judges very politely favoured the reporters with the following answers.

From Judge FLEMING.

“In a conference with the Judges, on the point of *quod cum*, after the argument of *Lomax v. Hord*, I understood it to have been the unanimous opinion, as it was my own, to adhere to former decisions of the Court, on the subject; it being better to compel the practitioners to follow precedents, and conform to law, than that the law should bend to their loose practice.”

W. F.

From Judge TUCKER.

The reporters were verbally authorised by Judge TUCKER, to say that he concurred in the above statement of Judge FLEMING.

From Judge ROANE.

“*S. R.* presents his respects to Messrs. *Hening* and *Munford*. In answer to their note respecting the decision of the Court on the point of

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Gleeson's heirs against Scott and others.

Tenant in tail (before our Act of Assembly for docking entails) might, by a deed of bargain and sale, convey a base fee (a defeasible estate) voidable by the issue in tail, but not by himself. Therefore, a tenant in tail, having bargained and sold to his own heir at law in fee, could not afterwards sue out a writ of *ad quod damnum* to bar the entail; being no longer seized of an estate tail, which was absolutely necessary to authorise him to sue out such a writ.

THIS was an appeal from a judgment of the District Court of *Accomac*, rendered in favour of the appellees, who were demandants in a writ of right, against the now appellants, who were the tenants. Issue being joined on the

"quod cum, he begs leave to say;—that the question first occurred in the Court of Appeals, to his knowledge, in the case of *Bullard v. Leavell*, which has never been reported. In that case, two of the Judges (of whom *S. R.* was one) were of opinion, that the defect was *substantial*, and that it was not cured by a verdict: two other Judges thought otherwise. Since the accession of Judge TUCKER to the Court, he has adopted the former opinion, and several decisions have been given conformably thereto, by the voices of the three present acting Judges. The grounds of the opinion of *S. R.* were stated, in the said case of *Bullard v. Leavell*. He has not since seen cause to change that opinion: but understanding that some dissatisfaction existed with a *part* of the bar, touching this decision, and fearing, from various information, that this error was very general, with the profession in this country, upon the occurrence of the point again, in the case of *Lomax v. Hord*, it seemed to him worthy of reconsideration, on this last ground only; and he mentioned his wish in Court, that it should be reconsidered. That request was acceded to. It was made by *S. R.* under the influence of a principle, stated by one of the Judges, (supposed to be Mr. *Pendleton*), in the case of *Borwell v. Jones*, 1 *Wash.* 322. 'that although uniform decisions which establish the rules of property, ought to be adhered to, yet that he (the Judge) did not view them as sacred in points of practice, which should vary, as experience should evince their convenience or inconvenience.' In a conference after this with the other Judges, as they evinced no wish to retract their former opinions, as *S. R.* possessed no *decisive* evidence of the *extent* of this error, and as, in general, it is better to compel practitioners to conform to decisions, than that the law should bend to suit a loose practice, he readily acquiesced: especially as he had never doubted the correctness of the opinion, in reference to adjudged cases."

"Messrs. *Hening* and *Munford*, *Richmond*, May 16th, 1809.

NOTE BY THE REPORTERS.

It has long been settled in *England*, that the *quod cum* in *trespass* is fatal. *Gilbert*, in his *History and Practice of the Common Pleas*, page 124, 125. says, "The declaration must contain such certain affirmation, as that it may be traversed; for, if there be no certain affirmation to make the declaration itself traversable, it will not be cured after verdict, because it is a defect in the substance, if nothing be positively affirmed to be put in issue;

were right, a case was agreed between the parties, from which the following statement is extracted.

Henry Scott, the elder, was seised in fee of the lands in question, and by his will, dated on the 19th of January,

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"and therefore, if a declaration be *quod cum* the defendant assaulted him, "and the defendant pleads not guilty, there is nothing put in issue; for the "pleadings have affirmed nothing; for, though the defendant be found "guilty on that issue, yet the plaintiff cannot have judgment, because no- "thing is positively affirmed in the defendant by the *allegata*; but if the "plaintiff declares *quod cum* the defendant *concessit se teneri*, or *quod cum* "*mutuatus fuisset et non solvit*, or *cum dimisisset*, and the defendant *ejecit*, "in these cases there is a positive charge upon the defendant, and the *quod* "*cum* being a branch of the whole period, and making one sentence with "the latter part of it, it is a positive affirmation; therefore, being positive, it "is equally traversable with the latter part; and therefore a man may plead "*non est factum, non mutuatus, non dimisit*; because, though these came un- "der the *quod cum* taken together with the rest of the sentence, being po- "sitive they make substantive issues of themselves." Accordingly, in all the ancient and modern books of entries of any authority, we find the charge in trespass positively alleged, and never with a *quod cum*, or *whereas*. In the Common Pleas, indeed, the declaration commences by way of recital, that the defendant was attached to answer the plaintiff *wherefore, &c.* reciting the substance of the writ; but it afterwards goes on to affirm *positively*; (see a precedent in *Plowden*, 21. *Colthirst v. Bejushin*.) which is the reason why that Court gets over the objection arising from the *quod cum*, although it is held fatal in the *King's Bench*; where the plaintiff declares immediately against the defendant in the custody of the Marshal, &c. and does not recite the writ. See the *Old Book of Entries, (Liber Intrationum)* edit. 1546, folio ccix. where there is a declaration,¹ "by bill against a per- "son in custody of the Marshal," for trespass, assault and battery, and wounding; setting forth, by way of aggravation of damages, that in consequence of the defendant's threats, and the plaintiff's fear of his life, he was prevented from attending to his business, in buying and selling merchandise, &c. for a long space of time, &c. This declaration commences with a positive averment, thus: "*Lawrence Burgoyne complains of William Ranso*, "being in custody of the Marshal of the Marshalsea of our lord the King, "before the King himself of this, that (*de eo quod*) he, on the twenty-fifth "day of *August*, in the eighth year of King *Henry VIII.* with force and "arms, to wit, with swords, staves and knives, upon the said *Lawrence*, at "*Stellyng*, in the County aforesaid, made an assault, and him beat, wounded, "and ill-treated, so that his life was despaired of," &c. The declaration then goes on to state the threats of the defendant, and the plaintiff's loss of business, and concludes with *alia enormia*, and *contra pacem*, in the usual form. In the next folio of the same book, there is a declaration in *case*, upon the custom of *England*, for negligently keeping fire, whereby the plaintiff's goods and chattels were burnt: which declaration commences with the same positive averment. In folio ccxviii. b. and many other parts of the same book,

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1731, devised them to his son, *Henry Scott, and the heirs of his body forever*; and died in that year. *Henry Scott* the younger, and devisee, being thus *tenant in tail*, on the 2d of *March*, 1761, executed a deed of bargain and sale for the

declarations in trespass by original, may be found; which commence with *whereas*, in reciting the substance of the writ, but afterwards charge the act positively. See also *Rastall's Entries* 661. b. 675. b. 667. b. 669. b. 643. a. 633. a. &c. *Coke's Entries*, 667. a. b. *Robinson's Entries*, from 453 to 479. *Hensard's Entries* in the Court of King's Bench, from 206 to 224. in all of which the choice is positively laid. *Herne's Pleader*, 809. 2 *Lilly's Entries*, 428. 431. 435. 437. 447. &c. 1 *Richardson's Practice*, K. B. 182. 183. 2 *Richardson's Practice*, C. P. 244. 267. 1 *Impey's Practice*, K. B. 153, 154. *Morgan's Precedents*, 637. 644. 9 *Wentworth's System of Pleading*, 1. 4. 45. 94. &c.

Some elementary writers in *England*, have said that *quod cum* in trespass was well enough after verdict, though possibly it might be bad on demurrer. See 5 *Comyn's Digest*, by *Rose*, 766. tit. "PLEADER." (3 M. 3.) 2 *Morgan's Vad. Mec.* 233. In support of this position, the case of *Douglas v. Hall*, 1 *Wils.* 99. is cited: but on examining that case, it will be found, that although the Court of King's Bench, inclined to get over the objection, yet the point was never decided. Afterwards, in the case of *White v. Shaw*, 2 *Wils.* 203. in the *Common Pleas*, it was expressly adjudged on special demurrer, that the *quod cum* did not vitiate the declaration; but this was on the ground, that, in that Court, the writ is set out in the declaration, and the count is helped thereby; though perhaps, said the Court, if it had been a proceeding by bill in the King's Bench, it might have been ill. To the same effect is *Burnes's Notes*, 452. *Hall v. Douglas*. *Ibid.* 249. *Warren v. Lapdon*. *Barnardiston's K. B.* 423. *Butiman v. Fowler*. *Andrews*, 21. *Smith v. Reynolds*. *Ibid.* 282. *Goodright v. Hodgson*. But the Court of King's Bench now get over the objection, *after verdict*, by suffering the plaintiff to file a right bill, (the time of filing which they refuse to inquire into,) and then amending the declaration by it. See 2 *Str.* 1151. *Wilder v. Handy*. *Ibid.* 1162. *Marshal v. Riggs*. 1 *Tidd's Practice*, (*Kiley's* edit.) 390.

The following cases turned upon objections to the declaration, for want of a positive averment. *Cro. Eliz.* 507. (*B. R.*) *Briggs v. Sheriff*, in trespass, assault and battery. Judgment of the Common Pleas reversed, on account of *quod cum* in the declaration. *Style*, 117. (*B. R.*) *Butler v. Long*. After verdict and judgment in trespass in a Corporation Court, error was brought, and the *quod cum* assigned for error. Per *L'olle*, *J.* *quod cum* in trespass is not good, though in another action it may. 2 *Jones*, 197. (*B. R.*) *Cholmely v. Morton*. Trespass for battery and false imprisonment: the plaintiff declared *quod cum*, &c.: the defendant justified by process of an inferior Court; and after other pleadings, there was a demurrer: but the Court without regarding the plea, and though it was a confession of the matter in the declaration, gave judgment that the plaintiff take nothing by his bill, for by the (*cum*) the declaration was defective in substance, nothing being precisely affirmed. 2 *Bulstrode*, 214. *Sherland v. Heaton* (*B. R.*) Trespass for assault and battery; on not guilty pleaded, there was a verdict for the plaintiff, and a mo-

same lands to his son and heir at law, *Caleb Scott*; by which deed in consideration of the sum of fifty pounds, he conveyed an estate in *fee-simple*, to hold to the said *Caleb*, his heirs and assigns forever, to his and their proper use

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tion in arrest of judgment, because the declaration was with a *quod cum*. After two arguments the whole Court, except *Coke*, were of opinion that the declaration was bad, and determined that they would be governed by precedents, which were ordered to be searched for; and two were found by the *Secondary* directly in point that the *quod cum* was insufficient. On the first argument, *Coke* held that the declaration contained sufficient matter of substance; but however that might be, he thought it was aided by the statute 36 *Edw. III. c. 15.* which declares, that "by the ancient terms and forms of pleadings, no men shall be prejudiced, so that the matter of the action be fulfilled by shewed in the declaration and the writ." 2 *Levinz* 193. *Mors v. Thacker.* (B. R.) Case for words: there were two counts in the declaration, the second of which was *cumque etiam* the defendant spoke certain other words, &c. After verdict and entire damages given, it was moved in arrest of judgment, that the last count was not affirmative. But, by the Court, this is well enough in an action on the case, as this is, though in *trespass*, it has been ruled in. *Ibid.* 200. *Wettenhall v. Sherwin* Error of a judgment in battery, in *Chester*, that the declaration was by way of recital, *quod cum*, he was beaten, &c. upon which the judgment was arrested. *Fitzgibbons*, 255. (B. R.) *Norman and George.* Trespass, assault and battery, in the *Common Pleas*; verdict for the plaintiff, and error brought in the *King's Bench*; and the error assigned was that the declaration contained no positive averment, being with a *quod cum*. It was argued on the point, whether the recital of the writ in the declaration could aid the count; the Court seemed to incline against the plaintiff; but no judgment was given.

It was, however, afterwards held, in *White v. Shaw*, 2 *Wils.* 303. that in the *Common Pleas*, where the writ was set out in the declaration, the count was helped by the writ; and judgment was given for the plaintiff. *Salk.* 636. (B. R.) *Hore v. Chapman.* In trespass, the plaintiff declared *quare vi et armis*, &c. and after verdict for the plaintiff, judgment was arrested; for *quare* is not positive but interrogatory, and much worse than *quod cum*. But if in trespass, the plaintiff declare with a *quod cum*, and afterwards charge another trespass with *also de eo quod*, &c. and have a verdict as to the last part, though it be for the defendant under the *quod cum*, judgment shall not be arrested; for the latter part is by way of a positive charge. 2 *Stra.* 681. *Dobs v. Edmonds.* 2 *Lord Raym.* 1413. *S. C.* 2 *Show.* 27. *Dunstall, qui tam*, &c. v. *Dunstall.* Debt on the statute of conventicles, for the penalty of twenty pounds. After judgment, error was brought, and it was objected that the declaration was by way of recital, with a *quod cum*; so that there was nothing laid positively, no direct averment that there was a conventicle held or kept. Judgment was reversed. *Ibid.* 295. *Gourney v. Fletcher.* In an action on the case, in *Ireland*, the plaintiff declared *quod cum*, the defendant took, and by force and arms detained certain goods, &c. *per quod* the plaintiff

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and behoof, and to and for no other use, intent or purpose whatsoever; with a covenant that the bargainor was possessed of an indefeasible estate in fee-simple, and that the same was free and clear of all incumbrances; and with a general warranty, and covenant for further assurances at any time within seven years; and concludes with these words: "In witness whereof the party to these presents hath set his hand and seal the day and year first above written. But be it always provided, and it is the true intent and meaning of these presents, that he the said *Henry Scott*, shall have the whole use and benefit of the above bargained land

lost the sales. After judgment for the plaintiff, a writ of error was brought in the Court of *King's Bench*, in *England*; and it was held that the *quod cum* was naught, though in case; because the *dint* of the action was the taking and detainer, and the *per quod* was only damage; and so there was no direct affirmation. And the judgment was reversed. *Ibid.* 447. *Dennis v. Eshley*. Replevin. Motion in arrest of judgment, for that there was no express averment of the taking, in the declaration, but only by a *quod cum*; though in case or *debt* it be well enough. Ordered to stay till moved on the other side. 1 *Str.* 621. *Amyon v. Shore*. In assault, it was once well laid, and then went on with a *cumque etiam*, and laid another assault: there were entire damages; and it was moved in arrest of judgment, that the last assault was not positively laid, but only by way of recital. It was contended that the *cumque* should be construed as *moreover*; but *per curiam*, it has always been taken only as a recital in these declarations, and the judgment was arrested. See also 1 *Tidd's Practice*, 380. 1 *Wash.* 135. *Smith v. Walker*, executor of *Michel*. Case, upon a contract of marriage; the plaintiff states that the defendant promised to give his grand-daughter as much as he should give to any of his own children, but does not aver how much he gave to either of his own children, as to what the plaintiff's claim amounted. Held that there was no breach sufficiently assigned. 1 *Call*, 83. *Chichester v. Vass*, *S. P.* 2 *Call*, 39. *Cooke v. Simms*. In an action of *assumpsit*, on a note of hand, it was held that there must be an *express assumpsit* laid in the declaration; a mere recital of the note in the declaration, not being sufficient. In the case of *Holbrook v. Pratt*, 1 *Massachusetts Rep.* 96. it was held that the *quod cum* in trespass was ill; but in *Coffin v. Coffin*, 2 *Massachusetts Rep.* 358. the Court from a review of all the cases, determined that it was not fatal, after verdict. In the latter case, however, some stress was laid on the particular words of the statute of jeofails of *Massachusetts*, which was considered as more extensive in its operation than the *English* act of parliament; and also on the process and form of the judgment in the Courts of that State; the proceedings being nearly assimilated to the practice of the Common Pleas of *England*; and the judgment in trespass never being a *capiatur*. See the very able opinion of Ch. J. PARSONS, in the above case.

"and appurtenances to him during life." This deed was sealed and delivered in presence of three witnesses, and proved by *two* of them, within eight months, (*viz.* in *August*, 1761,) but not by the *third* till nearly ten years afterwards, (*viz.* in *March*, 1770,) when it was admitted to record.

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On the 19th of *December*, 1769, *Henry Scott* the younger being in possession of the premises, sued out of the office of the General Court a writ of *ad quod damnum* for docking the entail,⁽¹⁾ directed to the Sheriff of *Northampton* County, reciting that *HE* was then seised as tenant in *fee-tail* of the said lands; which writ was executed by *John Harmanson*, the then Sheriff, on the 17th of *January*, 1770. The quantity of land mentioned in the writ is one hundred acres, and in the inquisition, ninety-nine. At the time of suing out this writ, *Caleb Scott*, the bargainee, is admitted to have been dead, leaving issue, four daughters, two of whom died in 1784, under age and without issue; the third died in 1787, leaving a *natural* son (*George Fisher*, alias *Scott*,) one of the demandants; the fourth is *Peggy Scott*, the other demandant.

On the 15th of *August*, 1770, (after the deed from *Henry Scott* the younger, to his son *Caleb*, had been fully proved and admitted to record,) the said *Henry* executed a deed of bargain and sale of the premises, reciting the devise to

(1) By the laws of *Virginia*, (edit. 1769. p. 145, 146. s. 14, 15, 16.) it was declared that no fine or recovery should be levied or suffered, whereby to defeat any estate-taille; nor should such estate be cut off or defeated by any means whatever except only by act of Assembly. But for the convenience of poor people, seised in *fee-taille* of inconsiderable parcels of land, often ignorantly or undesignedly devised in *taille*, it was further declared that any person or persons seised in *fee-taille* general or special, of lands, tenements, &c. not exceeding the value of two hundred pounds sterling, might sue out of the Secretary's office, a writ in the nature of an *ad quod damnum*, directed to the Sheriff of the County where the land lies, to inquire by a jury of its value. And on complying with the requisites of the act, the tenant in *taille* might afterwards by deed of bargain and sale, reciting the title and inquisition, and expressing a valuable consideration *bona fide* paid, convey the land in *fee-simple* to a purchaser, and thus bar the issue in *taille*.

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him as tenant in tail, and the execution of the writ of *ad quod damnum*; whereby, in consideration of 100*l.* to him in hand paid by *John Harmanson*, he bargained and sold the same to him and his heirs and assigns forever; to his and their proper use and behoof forever, and to no other. There is no clause of warranty, nor any other covenant contained in this deed, which was proved and admitted to record in the General Court at the next term. *Harmanson* afterwards, on the 13th of *February*, 1771, sold and conveyed the land to *Teakle Robins*; whose executor, by virtue of a clause in his will, directing the land to be sold for the payment of debts, sold and conveyed the same, on the 12th of *August*, 1777, to *Thomas Dalby*; who, on the 10th of *February*, 1778, sold and conveyed it to *John Gleeson*, senior, who died seised thereof, and by his will devised it in fee-simple, to the tenants, in the writ of right mentioned, who entered thereon, &c.

It was agreed that *John Harmanson* had notice of the deed from *Henry Scott* the younger to *Caleb Scott*, before the execution of the said *Henry's* deed to him, to wit, on the day of executing the writ of *ad quod damnum*; and that *Teakle Robins* and *Thomas Dalby* also had notice thereof before the execution of the several conveyances made to them. But no notice is alleged to have been received by *John Gleeson*, senior, of that deed, at any time.

The District Court gave judgment for the demandants; from which judgment the tenants appealed to this Court.

Call, for the appellants, argued that the deed of bargain and sale from *Henry Scott* the younger to his son *Caleb*, being a grant of a freehold *in futuro* was void. But even if it were good, it passed only a life-estate; because such conveyance by a tenant in tail would only transfer so much as he could lawfully convey. That *Henry Scott* the younger having obtained possession of the land, not wrongfully from any thing that appears, was remitted to his former estate, and might lawfully defeat the entail of the writ of *ad quod*

damnum, and afterwards convey the land in fee. But the point, on which the whole cause turned, was, that *Gleeson*, under whom the tenants claimed was a purchaser, in 1778, for valuable consideration without notice. To this was opposed the deed of *Henry Scott* the younger, to his son *Caleb Scott*, in 1761, which was not recorded in due time.

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By the law then in force(a) no estate of freehold in lands or tenements could pass, but by deed, acknowledged by the party, or proved by THREE witnesses within eight months, and recorded. The 4th section declares, that all deeds not so acknowledged, or proved and recorded, "shall be void, as " to all creditors and subsequent purchasers." The act of

(a) See *Laws*
Virg. 1748.
edit. 1769. p.
142, 146. s. 1,
2, 3, 4.

1785(b) shews the sense of the legislature on the subject ; for in that act, it is declared that such conveyance shall not be good "against a purchaser for valuable consideration, " not having notice thereof, or any creditor," unless it be proved and recorded as the act directs. But the act of 1748, makes the deed void, whether there were notice or not. In the case before the Court, the deed was proved by two witnesses within eight months, but not by the third, till nearly ten years afterwards. The admission of the deed to probate, on the oath of two witnesses, was merely for safe-keeping, and could give it no additional validity ; and the proof by the third witness was *coram non judice* ; the jurisdiction of the Court being confined to eight months. If it be objected that, after the deed was recorded even though the eight months had elapsed, it would operate as *constructive* notice, it may be answered, that a party is not bound to look for a paper which is not a matter of record ; and no recording in any other manner than the act prescribes, will be a compliance with the law. Hence it is, that Courts of equity entertain bills for new conveyances. On the last point, Mr. Call cited the following authorities, as containing the same principle, viz. 1 *Wash.* 319. *Turner v. Stip.* 2 *Wash.* 64. *per curiam*, in the case of *Currie v. Donald.* 1 *Call*, 121. *Maxwell v. Light.* 2 *Call*, 198. *Anderson v. Anderson.* 1 *Johnson's (N. Y.) Rep.* 498. *Jackson, ex dem. Wyckoff, v. Humphrey.* *Kippen and Co. v. Walrond, Fe-*

(b) See *Secs.*
Acts, p. 51.
and *Rev.*
Code, vol. 1.
c. 90. s. 1. p.
156, 157.

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deral Court, (MS.) per Judge Chase, who held clearly that a subsequent purchaser should be protected against a deed not fully proved in time.

(a) *Shep.*
Touch. 510.
2 *Black. Com.*
334.
(b) 3 *Burr.*
1703. 1705.

Wickham, for the appellees, contended, that by the deed of *Henry Scott* the younger, to his son *Caleb*, the whole estate passed to the bargainee; and though a use limited upon a use would be void at law, (a) yet a Court of Equity would consider it a trust, and enforce it. In *Goodright, ex dem. Tyrrell, v. Mead and Shilson*, (b) it is said by all the Judges, to be a settled point, "that a release, or a bargain and sale by the tenant in tail, is *not absolutely void*; but "conveys a *base fee, defeasible by the issue in tail*;" but certainly not by the tenant in tail himself. This conveyance, then, operated as a complete divesture of the estate of *Henry Scott* the younger, and passed *all his estate*, not for life only, but in fee-simple, determinable by the issue in tail. On the same principle, it has been decided, that such a conveyance, by tenant in tail, of the wife's land, would deprive the husband of curtesy. (c) If *Caleb Scott* had brought his action at law, he must have recovered, and the father would have been driven into equity to support his life-estate; the *legal* estate being vested in the son. It may be contended that the deed from *Henry Scott* the younger, to his son was *wholly void*, by the express terms of the act of 1748, sect. 14. (d) which declares all conveyances for the purposes of defeating an estate tail, *void*. But the statute *de donis* had a clause equally comprehensive; and it has always been held, that as the object of the law was to protect the *issue* in tail, so far as the deed went to defeat *his* estate, it was void, only; but was good, as it respected the *tenant* in tail. (e) *Henry Scott*, therefore, not having the *seisin of the land in tail*, was not authorised to bar the issue by a writ of *ad quod damnum*.

(c) 7 *Term*
Rep. 276.
Doc. ex dem.
Neville, v.
Rivers and
others.

(d) See *Virg.*
Laws, edit.
1769. p. 145.

(e) 3 *Call*,
410. per *Pen-*
nington, J. in
Nelson v.
Harwood.

Whether a subsequent purchaser or creditor should be bound by *constructive* notice of a deed *after* it was recorded, though not within the eight months, is a question of immense importance to the citizens of this country. On

principle, nothing can be clearer than that, after a deed is once recorded, it is constructive notice to the whole world; and such has always been understood as the course of decision under the old General Court system. In *England*, the *Register act* says not a word about notice, and yet it has always been construed as if the words "without notice" had been inserted after the word "purchasers." (a) None of the cases cited by Mr. Call apply to the present; because they either turned upon the *insufficiency* or *irregularity* of the proof, which did not authorise the Court to receive the deed at all; or contained the opinions of respectable Judges of other States not conversant with our laws. But there is nothing to prevent the Court from receiving proof of the execution of a deed, after eight months from its date. Besides, a deed may bear date prior to the time of its *delivery*, which is the true date in law, or it may be reacknowledged by the grantor; and, if this should not appear from the face of the deed, proof may be admitted to shew it, and the time of the *delivery* or *reacknowledgment*, though posterior to the date, would be the period from which the eight months should be computed. Every person is presumed to have notice of an instrument when he *might* have notice; and every thing which puts it in the power of a party to obtain notice, is *constructive* notice. In the case before the Court, *Harmanson* not only had *actual*, but *constructive* notice; not having purchased till after the deed from *Henry Scott* the younger, to his son *Caleb*, was fully proved, and admitted to record.

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(a) *Comp. 712.*
per *Lt. Mans-*
field in *Doe v.*
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Wednesday, March, 15th. The President delivered the resolution of the whole Court, (absent, Judge LYONS,) that there was no error in the record, and that the judgment of the District Court be AFFIRMED.

The reporters are authorised to state, "that the Judges were unanimous upon this ground, that *Henry Scott* the younger, having by his deed of bargain and sale, with warranty, to his son *Caleb*, and his heirs, and also with a cove-

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"nant that he was seised of an estate in fee-simple, and for
"further assurance, parted with his whole estate in the lands
"in question, was no longer seised of an estate tail therein,
"which was absolutely necessary to entitle him to sue out
"a writ of *ad quod damnum* ; and by so doing was guilty
"of a fraud, and nothing passed by virtue of his subse-
"quent deed of bargain and sale to *John Harmanson*,
"which was therefore void in law."

Wednesday,
March 8th,
1809.

Vance against Walker.

An agree-
ment con-
cerning the
purchase of
lands, perfect-
ed by the exe-
cution of a
conveyance on
the part of the
seller, and by
acceptance
thereof and
payment of
the purchase-
money, or
execution of a
bond or bonds
for the same,
on the part of
the purchaser,
is final and
conclusive be-
tween the
parties and
their heirs, in
law ; and
ought not to
be disturbed
in equity, un-
less fraud, or
some manifest
mistake in
such convey-
ance, or bond
be shewn and
proved ; or
unless some
note or me-
morum in writing be made, pursuant to the statute of frauds and perjuries (if subsequent to that statute) at the time, or after the execution, of such conveyance or bond, whereby it may appear that the parties had agreed to some further explanation or modification of the terms of the agreement as therein expressed.

ON the 5th day of *July*, 1802, *John Vance* exhibited to the Judge of the Superior Court of Chancery, holden at *Staunton*, a bill against *Francis Walker*, stating, in substance, that a number of years ago a certain *John Huston* settled upon a tract of land lying in the County of *Washington*, included within the limits of a grant made to Dr. *Thomas Walker*, generally denominated the "*Wolfhill tract*," that the said *Huston* settled upon the said land on the faith of proposals then published by the said Dr. *Walker*, inviting persons to settle within the limits of his grant, and that they should have a fee-simple in the lands settled, on payment of 11*l.* for every hundred acres by them desired ; that, after *Huston* had made some improvements on the said land, the complainant purchased of him his right, subject to the payment of the money due Dr. *Walker*, which had not been paid, took possession of the land, and remained possessed thereof. That several years afterwards, Dr. *Walker*, who resided in *Albemarle*, came to the County of *Washington*, and being informed of the circumstances aforesaid by the complainant, appeared well satisfied, and agreed that he should have all the land lying within certain

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designated bounds, not claimed by or surveyed for any other person, at the established rate of 11% with interest thereon from the time of actual settlement; but, as the land had never been surveyed, and lay between the claims of a number of other persons, the complainant and the said *Walker* could not then ascertain the actual quantity comprehended within the limits agreed on by them, but estimated it at 300 acres; that, thereupon, the complainant delivered to *Walker* a horse at the price of 65% and received of him 25% (the price of 300 acres of land, at 11% per hundred acres, together with the interest thereon, amounting to the sum of 40%) it being expressly agreed between them, that the complainant's receiving the said surplus of 25% should not prejudice his right to the residue of the land within the designated limits; but that he should have whatever that quantity might be, when ascertained, on paying the said consideration of 11% per hundred acres, and interest thereon from the time of actual settlement; that *Walker* promised to have the land surveyed in a short time; that, afterwards, he appointed a certain *Daniel Smith* his agent respecting those lands, to whom the complainant made frequent applications to come and survey the land, which he always failed to do; that the said *Smith* removed out of the State, and, after his removal, the said *Thomas Walker* had no agent in the County of *Washington*.

The bill further stated that *Thomas Walker* departed this life, having devised the lands comprehended within the "*Wolfhill tract*," to his son *Francis Walker*, who about two years before the filing of the bill, came to the County of *Washington* to settle the matters relative to the said tract of land; that the complainant then made application to him, stated the circumstances aforesaid, and requested that the land he had purchased might be laid off, and the quantity ascertained, and that he would, on the complainant's paying according to his contract, make him a title: that, accordingly, the land was surveyed, and discovered to contain 773 acres; whereupon the said *Francis Walker* refused

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to let him have any greater quantity than 300 acres, unless he would pay at the rate of twenty shillings for each acre exceeding that quantity, and threatened, in case of refusal, to sell the quantity exceeding three hundred acres ; that the complainant being ignorant in law, and not knowing, at that time, that he could prove the contract with *Thomas Walker* ; and "being much intimidated by the threats of "the said *Francis Walker* ; not knowing as no part of the "land had ever been laid off, but the said *Francis Walker* "would compel him to take the 300 acres in some part of "the tract the least valuable, and take away the valuable "improvements which he had made with much expense "and labour for many years ;" consented to pay the sum demanded ; and gave two bonds for 21*l.* each, as the consideration money for the quantity of land exceeding 300 acres ; but that it was expressly agreed between the said *Francis Walker* and him, that, if he could thereafter prove any agreement with the said *Thomas Walker*, deceased, he should have the benefit thereof, whatever it might be ; that he had since discovered, from a reputable person who was present at the time when the said *Thomas Walker* contracted with him, that he could by his testimony fully prove the said contract ; but that *Francis Walker* had, nevertheless, instituted suits on the said two bonds in the District Court of *Washington* and recovered judgments. The bill concluded with praying an injunction to the said judgments, or so much thereof as exceeded 11*l.* for each hundred acres, with the interest thereupon ; which was granted.

The answer of *Francis Walker* admitted that *Thomas Walker* had a patent for the tract of land called *Wolfhill*, a part of which he sold to sundry persons ; but alleged that a considerable part was settled by individuals without any contract whatever ; that the respondent knew nothing of any contract with *Huston* relative to the land in question, and finding no mention of any transactions with him in the books of *Thomas Walker*, supposed that, if *Huston* ever was in possession of the said land, he became so by an unlawful entry, and was never legally entitled thereto. The

respondent also denied any knowledge of the proposals alleged in the bill to have been made by *Thomas Walker*; observing that, if ever made, they must have appeared in the public prints of that day, and might easily now be produced; but that he had often required the persons in that neighbourhood to produce the proposals under which many of them pretended to set up claims to the land, and none of them ever shewed any such; that, probably, those proposals related to the lands of the *Loyal Company*, of which *Thomas Walker* was a member, manager, and director, and not to those belonging to himself; the respondent having always understood that such proposals were made by him relative to lands belonging to the said Company, which were near and adjoining his own.

The answer farther stated that the respondent when he visited the *Western Country* invited all who had made any contracts with *Thomas Walker*, to come forward and produce them; averring that he was ready to make, and did actually make deeds to all who called upon him properly authorised to demand a conveyance; that, accordingly, he made a conveyance to the complainant for 300 acres, in consequence of the contract which appeared to have been made with him, and also for 473 acres more which he purchased of the respondent, and for which he executed the bonds in the bill mentioned; that on the books of *Thomas Walker*, the complainant is charged with 300 acres of land sold him, and is credited by 40*l.* in part of principal and interest due for the same; that the respondent offered to lay off the lands to which the complainant was entitled in such manner as he should direct, and so as to include his improvements; and never used any threats to induce him to execute the bonds, which were given in pursuance of a fair, just, and honest contract made with a view to accommodate him in many respects, particularly, as the land was sold by the respondent for less than he could have got from other purchasers; that the complainant did not, and, as the respondent believes, could not, shew a title even to the 300 acres, (which the respondent was willing to convey to him

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in consequence of the entry made in *Thomas Walker's book*,) much less to any other portion of the land, and (so far from pretending to establish a claim for more than 300 acres) in a conversation with the defendant about the time of making the purchase, *expressed his regret that he had not purchased the whole of the lands of Dr. Walker, as he might then have got them for 11 $\frac{1}{2}$ per hundred acres.*

A number of depositions were taken, of which (as the Judges of this Court differed in opinion) the following abridged abstract may be proper.

John Campbell deposed that, in the fall of the year 1768, he came, for the first time, to the western parts of *Virginia*, now comprehended within the limits of *Washington County*; that, on his way, he overtook a number of persons who informed him that they were coming to see a tract of land owned by *Doctor Walker*, which the deponent understood was the *Wolfhill* tract, which they said he offered to settlers and emigrants at 11 $\frac{1}{2}$ per hundred acres; that the deponent saw *Doctor Walker* in *Staunton*, the following summer, and asked him on what terms he sold the lands within the survey called the *Wolfhills*; that he answered, at 11 $\frac{1}{2}$ per hundred acres, and observed that he had published fully his terms and conditions in advertisements dispersed in the *Western Country*, and that the deponent would see one at *Col. Inglis's*, and be fully informed. The deponent accordingly called and conversed with *Col. Inglis*, who confirmed the terms as mentioned; but the deponent could not say whether he saw the advertisement or not, nor that he ever saw one, but "*thinks he did*;" that, perhaps, at this period, there are none of them to be had; and he never heard of any being set up, except at *Fort Chiswell* and *Inglis's* ferry, few persons at that time being settled on the waters of *Holstein*; but it was a general report and belief, and never contradicted in any instance within his knowledge, that the terms on which the said *Wolfhill* tract was sold were at 11 $\frac{1}{2}$ per hundred acres. A few years afterwards, *Doctor Walker* came to that country, and the deponent asked him whether he then

continued to sell the said land at 11*l.* per hundred acres ; that he answered yes, but had established a uniform period from which interest should be paid. Afterwards *Robert Doake* came as his agent, and surveyed lands for settlers : he told the deponent his instructions were not to suffer any " *strips*" of land lying between surveys made for settlers, or the original patent line, but that they must join, unless there was sufficient between to make a plantation.

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Alexander Breckenridge deposed that, some time in the year 1769, a certain *Robert Doake* informed him that he was agent for Dr. *Thomas Walker* to settle and lay off a tract of land on *Holstein* river, known by the name of the *Wolfhill* survey, and to sell said lands out at 11*l.* per hundred acres ; and the deponent agreed with said *Doake* to take a part of said lands, provided he should like it when he saw it ; that he made choice of a part of the said land, and built a cabin thereon, to which he moved in *September*, 1770 ; that, in the year 1772, the said *Doake* laid off part of said lands to the settlers who were then upon it, and informed the deponent that his instructions from *Walker* were, that the purchasers must join two sides of the patent lines and one of a purchaser ; or one side to the patent line, and two sides to the purchasers' lines ; so that no vacant lands should be left between them : and, in the year 1773, the said *Doake* and *Walker* came and appointed the settlers to meet at *Samuel Briggs's*, on the 21st day of *April*, to execute bonds for payment of the purchase-money, and take *Walker's* bonds for conveyances ; and *Walker* said they should pay interest on the purchase-money until the whole should be paid, and then he would make them titles. *Alexander Breckenridge*, on being asked whether he was interested in this controversy, said that he was in no wise interested ; and also swore positively that *John Huston* improved part of the land, and sold his claim to *John Vance*.

Josias Gamble deposed that, in the year 1769, on his way to *Holstein*, he met with an advertisement at Col. *Ingalls's*, on *New river*, stating to all emigrants who wanted

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to settle on the *Wolfhill* tract, that they should have the land at 11*l.* per hundred acres ; in consequence of which advertisement, the deponent made a settlement on the said tract, and paid for it at the rate of 11*l.* per hundred acres ; that no time was limited when the 11*l.* should be paid, but settlers were at liberty to pay interest as long as they pleased ; that he paid interest from one year after he gave his bond ; that he knew of *Huston's* making an improvement on the same proposals, and that *Huston* told him that *John Vance* had bought of him.

James Piper swore that, he settled on part of the *Wolfhill* tract, under certain proposals, which he understood had been made by *Thomas Walker*, that settlers should have as much as they wanted at 11*l.* 10*s.* 0*d.* or 11*l.* per hundred acres ; for as to the sum he was not positive ; that he lived thereon about two years, and then made payment at the rate aforesaid, and pursuant to the proposals he had heard, and obtained a title for the quantity claimed according to those proposals.

Christopher Acklin (between whom and *Francis Walker* an appeal concerning part of the *Wolfhill* tract is now pending) deposed that, as well as he recollected, some time in the year 1771, *John Huston* made an improvement on the land which the deponent understood he afterwards sold to *John Vance* ; that he recollected a grey horse which *Huston* got from *Vance*, which he understood and believed was given as part of the price of the land ; that *Huston* claimed and sold to *Vance* more land than *Vance* ultimately obtained ; for that in settling a controversy between *Vance* and the deponent concerning their boundaries, the arbitrators ran the line between them so that *Vance* lost a part of what he claimed.

James Crow deposed that, in *April*, 1778, he applied to *Thomas Walker* to purchase a part of the *Wolfhill* tract, and was told by him that his price was 11*l.* per hundred acres, but that, as money then was not as good as it had been, if the deponent would pay him in horses and cattle, at the old rates, the price of the land should be as usual ; for he did

not raise the price of his land ; that, moreover, he heard him say that he charged interest from the time of the settlement made, and no farther back, as the settler ought not to pay interest until he received a benefit.

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Joseph Black deposed that, in 1778, *John Vance* and *Thomas Walker* were both at his house, and he saw *John Vance* pay *Thomas Walker* for 300 acres of land in a horse, and said *Walker* pay the difference between the price of the horse and the land, in cash, to the said *Vance* ; that *Vance* desired him to keep the money until the land was surveyed, but *Walker* chose to pay it : the deponent was told by both parties that *Vance* was to have the balance of the land he then claimed, by paying 11*l.* per hundred ; and *Walker* said his intention was to give good measure, for he allowed his surveyors to throw in five acres to every hundred. The deponent was told more than once by *Daniel Smith*, agent for *Walker*, that he had *John Vance's* land to run : he knew of no limited time within which the 11*l.* per hundred was to be paid ; and (being asked from what time the settlers paid interest) said that, one year after he gave his own bond, which was in 1772, he paid interest.

William Y. Conn described the improvements made on the land held by *Vance*, saying that about 100 acres were cleared, and several settlements made, separated by pieces of woodland ; and, in the deponent's opinion, 300 acres could not be laid off so as to include all the improvements, without great inconvenience, and, perhaps, not at all, without leaving spaces between it and the "adjoining neighbouring" lines.

Michael Deckart's testimony is to the same effect. *Joseph Acklin* made oath that, when his father, *Christopher Acklin*, was about executing a deed of trust to *Francis Walker*, to secure the payment of the purchase-money for a part of the *Wolfhill* tract, the deponent asked *Francis Walker* if executing the deed of trust would not preclude his father from the benefit of his contract with *Thomas Walker*, in case he could prove any ; and *Francis Walker* replied, that any contracts made with his father should stand good, though the

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deed of trust was executed. The deponent understood this expression as applying *generally to all persons* having claims to any part of the *Wolfhill* tract. This witness also swore that *Francis Walker* threatened to sell *Christopher Acklin's* land if he did not comply with his terms, which were twenty shillings per acre.

Benjamin Specker deposed that, when *Francis Walker* was in the *Western Country* settling his affairs respecting the *Wolfhill* tract of land, he was at the house of *John McCormick*, in *Abingdon*, with a number of persons who had given their bonds, and to some of whom he had executed conveyances, when it was mentioned by some person that, as the bonds were executed, they would be deprived of the benefit of contracts made with *Thomas Walker*, deceased, to which *Francis Walker* replied that, if *any person* claiming lands in the said tract, could thereafter prove having made a contract with his father, they should, notwithstanding their having given bonds, have the benefit of such contract, and that he would be bound thereby and carry it into effect; and called on the deponent and some other person to bear testimony; that, moreover, the deponent heard *Vance* tell *Francis Walker* that, if he had paid his father a trifle more, he would have got his deed, and that he could proye his contract with *Thomas Walker* by some person in *Frenchbroad*, in *Tennessee*.

James Vance swore that he heard *John Vance* complain to *Francis Walker* that he conceived it hard to pay 20s. per acre for the land he claimed, when by his contract he was to have had it at 11l. per hundred acres; and that *John Vance* would not have complied with *Francis Walker's* terms, had he not been afraid that *Walker* would sell the land to other persons; particularly, as it was understood that, if he refused to comply, a certain *Capt. White* was to have it.

The cause came on to be *finally* heard, by consent of parties, on the 9th of *July*, 1803, when the Chancellor

dissolved the injunction and dismissed the bill, whereupon *Vance* appealed.

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Wickham, for the appellant, considered the testimony sufficient to authorise a decree in his favour, insisting especially on *Francis Walker's* public declaration that, if any person so circumstanced, could prove the contract with Doctor *Walker*, his father, he would grant him the benefit of it ; and on the coercion under which *Vance* executed the bonds.

Call, for the appellee, commented, 1. On the depositions of *Joseph Black* and others, and endeavoured to shew that the evidence did not prove the contract contended for. He said the answer sufficiently contradicted the bill ; and the testimony produced, was not competent to outweigh the answer. He remarked the great improbability of such extensive credit being given (as it was pretended was given by Dr. *Walker*) where the consideration was only 11*l.* per hundred acres.

2. He relied on the principle of law that parol evidence of conversations previous to the execution of a deed, is not to be received to introduce any stipulation not contained in it ; in support of which he quoted 1 *Fonb.* 200. and the cases there cited. He observed, that to this rule there were only two exceptions ; 1st. Where by *fraud* some material part of the agreement was omitted ; and, 2dly. Where the drawer of the deed by *mistake* omits a part ; but there is no instance in which parol evidence is admissible where the parties understand the whole subject, and designedly fail to insert a part.

Wirt, on the same side. If ever there was a case, in which the salutary provisions of the statute of frauds ought to apply, this is one. It is attempted by parol evidence to get nearly 800 acres of land, instead of 300. If the evidence be now obscure, it is *Vance's* own fault : he might,

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thirty years ago, have brought his suit in chancery, to compel Doctor *Walker* to make a title. Why did he not pay up the money, and demand a conveyance? But he seems to have been of the same opinion, as to the paying of money, which *Falstaff* expressed concerning *Death*:—"If *Death* did not call on him, why should he call on *Death* to pay him his *debt*?"

The testimony of *Christopher Acklin*, a party at present contending with *Francis Walker*, and of a number of interested witnesses, is set up, in opposition to the answer, which has the utmost verisimilitude. The only memorandum in writing by Doctor *Walker*, is the entry in his book of 300 acres sold to *Vance*, with a credit of 40% in part. How strangely improbable is it that *Francis Walker* went out on purpose to settle these matters, yet issued a proclamation, giving unlimited indulgence to bring forward parol evidence at any time thereafter against himself and his heirs! Yet it does not appear, that the bonds were induced even by that declaration. *James Vance's* deposition shews no such thing; but only that *John Vance* complained to *Walker*, that he thought it *hard* to pay 20s. per acre, &c.

Wickham in reply. Three grounds are relied on by the counsel on the other side; 1. The improbability of the contract; 2. The statute of frauds; and, 3. The objection to parol testimony.

1. As to the first point. This contract was very probable. Doctor *Walker* was a great proprietor, interested in having his lands settled. Settlement itself was a part performance; and the settler had a right to call on the proprietor to perform his part. Doctor *Walker* ought to have had the lands surveyed; or, at any rate, it should have been a joint business. The testimony comes in aid of the probability. Gentlemen have not a right to discredit the testimony. *Joseph Black* is not interested; and his evidence is confirmed by that of *James Crow*. Neither is there any thing improbable in *Francis Walker's* making the agreement alleged; his anxiety to settle the business as far as

practicable, with all possible speed, that he might the sooner get home again, was a sufficient inducement. No survey took place until after Doctor *Walker's* death, and the business could not have been settled before the survey; the only boundaries being those *reputed*, by which *Vance* held.

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2. As to the statute of frauds. It is strange that gentlemen who take such high grounds should fly to that statute. We claim under the contract with Doctor *Walker*. The statute was not *then* in force. Besides, there was part performance, and a payment of money.

But was the statute *pleaded*? In *Rowton v. Rowton*,^(a) though not *formally* pleaded, it was relied upon in the answer: but *here* the statute has neither been pleaded nor relied upon, and it has never been decided by this Court, that, in such case, it can avail the party. But *Francis Walker* could not have relied upon it: we should have repelled him by saying, he obtained the bonds of *Vance* by means of the *fraudulent promise* by which he induced him to sign them.

(a) 1 Hen.
& Munf. 92.

3. With respect to the objection to parol testimony, what is this but setting up the broad principle, that *in no case* will parol evidence be received after a deed is executed, even where an agreement is made, that all errors shall be corrected; which is a common case?

Friday, March 17. The Judges gave their opinions.

Judge TUCKER declared himself satisfied with the opinion to be delivered by the President, which perfectly accorded with his ideas on the points in this cause.

Judge ROANE. About the year 1768 and 1769, Doctor *Thomas Walker*, who had a large tract of vacant land in the County of *Washington*, and wished to sell it out to settlers, published his price and terms therefor, in advertisements stuck up at two or three places in the *Western Country*. In consequence of these *proposals*, many persons went out and actually settled on the lands; and among

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others, *James Piper, Joseph Black, Christopher Acklin, Josias Gamble, Alexander Breckenridge, and John Campbell*, (who have all given depositions in this cause.) and *John Huston*, under whom the appellant claims. One of these advertisements was seen by *Gamble*, at *Ingles's* ferry, which also *John Campbell* thinks he saw; but none of them are exhibited in the cause; and *John Campbell*, who professes to have a general acquaintance in the *Western Country* thinks that none of them are now in existence. It is not strange that this should be the case; for they were perhaps only in *writing*, and not printed, and being intended for general information, it would have been improper for any particular settler to have taken them down, and appropriated them to his own individual use: they, however, as we are told by *John Campbell*, had produced a general opinion and belief, that the lands in question were sold at 11 $\frac{1}{2}$ per hundred acres. As, however, the act of frauds was not then in force, (nor in 1778, when a recognition of the terms of this proposal was made by *Dr. Walker* to the appellant,) we are at liberty to give evidence of their contents. It is agreed on all hands that these proposals stated that the lands in question, the *Wolfhill* tract, were to be sold at 11 $\frac{1}{2}$ per hundred acres; which, also, *Dr. Walker* told *John Campbell* was the price, in the summer of 1769; and *Josias Gamble* says there was no limited time for the payment of the money, but that the settlers were at liberty to pay interest as long as they pleased, commencing one year after their settlement. While the settlers were in some cases compellable to take more land than they wished, for they were to adjoin the lines of the neighbouring tracts, and leave no vacant spaces between. [See the depositions of *Breckenridge* and *John Campbell*.] It is not shewn or pretended that they were restricted in the quantity they were at liberty to procure. Indeed, when we consider that persons of that description, who alone were invited to purchase, were not in a condition to monopolize large quantities of land, there was no necessity for such a restriction on the part of *Dr. Walker*: and besides, as there was a large quantity of other

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lands at market in that Country at the same time, the interest of the proprietor would not have induced him to establish such a condition : he undoubtedly wished to sell as much of his own lands as he could. There is therefore not only no restriction in relation to quantity proved to have existed : but on the contrary, it is highly improbable that any such should have been contemplated : on the other hand, *James Piper* proves that it was understood that the proposals permitted settlers to acquire "as much land as they wanted."

Under these proposals thus unrestrained in this particular, *John Huston* made a settlement and improvement on the land in controversy. *Christopher Acklin* proves that *Huston* claimed and sold to *Vance* more land than *Vance* ultimately got, (that is, more than 300 acres,) and that he (*Huston*) claimed up to his (*Acklin's*) lines, and to certain lines to the north and west. This testimony I understand to go to this ; that *Huston's* claim was commensurate with the whole tract since conveyed to *Vance* by *Francis Walker*. Such was the extent of *Huston's* claim which he sold to *Vance*, and consequently such was the extent of *Vance's* claim ; and it is proved by *Black*, that in 1778, *Vance* having paid *Dr. Walker* for 300 acres, it was understood and agreed that he should have the balance of the land he then CLAIMED under *Huston*, (that is, the land now in controversy,) at the same price of 11*l.* per hundred acres.

This then is a solemn recognition and continuation of the right derived from *Huston*, as to the land in question. It is besides corroborated and supported by the following circumstances : 1st. *Dr. Walker* told *Crow* at the same time, (that is, in *April*, 1778,) that he sold his land on the *Wolf-hill* tract at 11*l.* per hundred acres, payable in horses or cattle at the old prices ; and 2dly. *Huston* (and under him the appellant) and *Acklin* always considered that their lands *adjoined* ; a line was run, by arbitration, between them after *Vance* purchased ; and *Vance* cleared the land in so many places that it is proved that a 300 acre survey, would not comprehend all the improvements. [See *Conn's* and

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Deckart's depositions.] It is not credible that *Huston* and *Vance* would have done this except under a belief that their title to the *whole* land could be sustained. When we add to this the evidence in the cause that the lines of adjacent settlers were to *join*, and leave no vacant spaces between, it is clear that both by the original contract between *Dr. Walker* and *Huston*, and by that proved by *Black* to have taken place in 1778, *Vance* was entitled to the whole land now in controversy.

Considerable aid is derived to this idea from the terms of the entry in *Dr. Walker's* books stated in the answer. That answer states that *Vance* "was charged in the books of *Dr. Walker* with 300 acres of land sold him," and "is credited "with 40*l.* IN PART of principal and interest due for the same."

Now, when it is recollected that it is *proved* that 300 acres were *fully* paid for, this expression "*in part*" amounts to an admission that it was supposed or admitted that there were other lands to which the appellant was entitled ; and which were not paid for : the number of 300 acres was charged undoubtedly, because, and only because, that quantity was known and admitted to be in the tract, and there was no other *specific* number by which *Walker* could charge it with certainty on his books.

It remains next to inquire whether the appellant has waived or forfeited this right thus clearly established, or not. I will inquire, 1st. Whether this is done by reason of the lapse of time ; and 2dly. Whether the settlement with *Francis Walker*, when *Vance* got his deed and gave the bonds now enjoined, operated such a waiver.

As to the first, it is proved that settlers were to pay interest as long as they pleased ; [See *Gamble's* deposition ;] and it is proved by *Breckenridge* that they were to pay interest till the whole was paid, when the conveyances would be executed. The settler was in the enjoyment of the land, and *Walker* was to receive interest on his money : it was in *Walker's* power to accelerate the *final* payment by surveying the land, and making conveyances ; and this perhaps was not in the power of the settlers. It is in proof that he

had surveyors for that purpose residing in that country ; and it was their *laches* that the surveys were not made, and the business completed. As to injury from length of time, it would have operated to the prejudice of *Vance*, but not at all of *Walker* ; for if *Black*, in the present instance, had died, he would have lost his testimony, and with it this cause, whereas *Walker* stood firm on the ground of his patent, and could sustain no injury as it related to the claim of the land. It is probable therefore, if not clear, that those delays, which too, by being *general*, exempt *Vance* from any suspicion of culpability, arose from the neglect of the agents of *Walker*, or from their inability to survey so many tracts in a shorter time ; and that the settlers were undoubtedly desirous to close their titles and get conveyances for lands, which the progress of events in that country had rendered it so important for them to acquire on such cheap terms. I cannot believe therefore that delay was wished or caused by any settler.

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Secondly, did *Vance* waive his right to this land by giving the bond and receiving the deed from *Francis Walker* ? The answer of *Francis Walker* says that *Vance*, so far from attempting to *establish* his claim for more than 300 acres, regretted that he had not "*purchased* more from Dr. *Walker*, at 11*l.* per hundred." As to *Vance's* not attempting to *establish* this claim, this might well be, because *Francis Walker* had come *suddenly* into the country, and his witness was not present : but he certainly *mentioned* his claim, and *complained* that it was not allowed. [See the depositions of *James Vance* and *Specker*.] Being thus unprepared at the time, it would have been vain to have attempted to *ESTABLISH* his claim, and would only have tended to irritate *Francis Walker*, and perhaps prevent him from letting *Vance* have the land. It is in proof that it was understood that Capt. *White* stood by, ready to purchase the land from *Walker*, and that *Walker* threatened to sell *Acklin's* land, if he did not comply with his terms. As to *Vance's* regretting he had not *purchased* more land at 11*l.* the testimony of *James Vance* and *Specker* shew that *Francis*

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Walker is mistaken ; unless we understand "*purchase*" here to mean paying for the land, and purchasing it so effectually as to put an end to the controversy. If we regard those depositions, and yet believe the answer, we must understand it in this qualified sense ; for both these witnesses say that *Vance* in conversation with *Francis Walker* relied on his purchase from Dr. *Walker* ; and *Specker* says that *Vance* told him " if he had paid Dr. *Walker* a trifle more, he would have got his deed, and that he " could prove his purchase by some one in *Frenchbroad*." These two witnesses therefore taken in connection with the other circumstances in the cause, outweigh the answer in this particular, unless it be taken in the sense in which I have endeavoured to explain it.

But *Vance* was induced by the declarations of *Francis Walker* to forbear to press his claim (now in question) at the time of giving his bonds. He declared publicly that any person who could *thereafter* establish contracts with his father should have the benefit of them, and even called witnesses to attest this declaration. Nothing could be more just than this declaration, or more convenient for a party acting with a numerous body of men standing on a common foundation, than to act by *general* rules and declarations ; particular communications with every individual being unnecessary and inconvenient in such cases. *Francis Walker* was as much at liberty to annex a condition to the settlements in question by such general declarations as those now proved, as his father was to contract, by means of his general advertisements aforesaid, with settlers whom he had never seen, and with whom he had no particular communication. *Francis Walker* in particular is estopped from making the objection ; for he tells us in his answer that he invited *all* who had claims to bring them in, and declared that he was ready to grant conveyances to *all* who were authorised to receive them. After thus adopting this general mode of acting with these people, it does not lie in his mouth to make the present objection. These declarations induced, or may have induced, *Vance* and others to suspend, or for-

bear to press their claims at that time ; to wait till they were more ready for the purpose ; and in the mean time, to get their deeds ; and it would be highly unjust to permit *Francis Walker* to withdraw himself from the effects produced thereby : such permission would sanction and produce the highest iniquity and injustice. As to *Vance*, there is no iota of testimony shewing that he ever waived or *gave up* this claim to the land in question. On the other hand, the general declarations above mentioned amounted to an agreement on the part of *Walker* that the settlements which then took place should not be *final*, if contracts with his father could thereafter be established ; in other words, if equity and justice forbade that they should be *final*.

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I am for holding *Walker* to his offer : I will not agree that *Vance* should thus be *taken in* ; and am of opinion *now* to establish that contract, which, independently of the transactions of that day, is proved beyond possibility of contradiction, and was not on that day abandoned.

It is said that the contract with Dr. *Walker* charged in the bill is not admitted by the answer. True ; but neither is it *denied*. It could not be *admitted or denied*, as it did not rest within the knowledge of *Francis Walker* ; but it is *proved* by the testimony. Again, it is said that the agreement charged on *Francis Walker* at the time of the settlement is denied by him, and not proved. I admit it is denied and not proved, taken in a particular view, as being made, or not, to *Vance himself* : but it is not *denied*, and is proved to have been made *in general*, and thus made to *Vance* himself under the doctrine I have now contended for.

As to the application of the act of frauds in this case, *both* the contracts on which the appellant relies were anterior to its existence. Besides, the contracts were *in part performed*, and therefore would meet the provisions of the statute had it been in force and relied on. The bonds and deed now in question, it is true, were posterior to the

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enaction of the statute ; but they do not form the *contract* which the appellant seeks to avail himself of ; but only the *consummation of it*. If it be said that a reliance on the parol proofs in this case is dangerous, I answer that the act of frauds does not apply to the two points of time embraced by them, and that it was not for Courts but the Legislature to adopt the rules of that statute. Independent of it, we must decide this case, as others, by the general doctrines of evidence. The parol testimony in this case of what passed at the time of giving the deed is not received to shew what the contract for the land was ; but to shew a collateral matter, *i. e.* that the settlement as to the price was not intended to be *final*. It may be said that it is desirable to settle controversies and put an end to litigation : while this is agreed to, it is perhaps more expedient that right and justice should take place. As to the doctrine of confirmation or *waiver*, there can be none unless it appear, either *expressly*, or by plain and necessary implication, that the party, with a full knowledge of his rights, and under a perfect freedom as to his course of proceeding, had waived them. In the case before us, the appellant had such strong inducements to get his deed, and ran such risks of losing his land by a course of opposition, that he stands excused from insisting on his right at that time, even if he had been certain of being thereafter able to establish it. I see nothing in this case on the point of waiver which does not apply to cases in *general* ; and it is too much to say that the giving bond and taking a conveyance shuts out all equitable claims or discounts in *all cases* whatsoever. On the contrary, as I have already said, the appellee himself has repeatedly disclaimed the character of a *final* and irrevocable settlement as applicable to the transaction in question ; and we ought to permit him to construe his own proceedings.

The right of the appellant to the land in question, therefore, not having been abandoned through lapse of time, (the delay in this case being well accounted for,) nor *waived* at the time of the settlement, or at any other time, either *expressly*, or by necessary implication, I am of opinion to re-

verse the decree, and let the appellant have the benefit of his purchase, at the rate of 11 $\frac{1}{2}$ per hundred acres, with interest, &c.

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Judge FLEMING. The bill charges, that the complainant had agreed with Dr. *Walker*, for all the land within certain bounds at 11 $\frac{1}{2}$ per hundred acres, supposed to contain about 300 acres, for which he paid him: the remainder, if any, to be ascertained by survey, which was not done in Dr. *Walker's* life-time. That about the year 1800, *Francis Walker* had the land surveyed, (which was found to be 773 acres,) and demanded twenty shillings per acre for the surplus of 473 acres. And being intimidated by threats of the said *Francis Walker*, and fearing he would take away his valuable improvements, he consented to give twenty-shillings per acre, and executed two bonds for the amount. But it was expressly agreed between *Walker* and himself, that, if he could thereafter prove any agreement or contract with Dr. *Walker*, the complainant should have the benefit thereof.

The defendant in his answer, says that he was ready and willing to make, and did make, deeds to all who called on him properly authorised to demand a conveyance, and was ready and willing to make a conveyance to *Vance* for all, and any lands to which he had a claim, under a contract with Dr. *Walker*, and made a conveyance to him of 300 acres, in consequence of the contract, which it appeared his testator had made with the said *Vance*, and also of 473 acres more, which *Vance* purchased of him, and for which he executed the bonds in the bill mentioned. That on Dr. *Walker's* books, *Vance* is charged with 300 acres sold him, and is credited with 40*l.* in part of the principal and interest due for the same. That the defendant offered to lay off the lands of said *Vance* to which he was entitled, in such manner as he should direct, and so as to include the improvements thereon. *The defendant never used any threats or menaces to induce the complainant to execute the bonds, but was willing and ready to make him a right to*

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all the lands to which the semblance of a claim appeared to exist in him. That *Vance* did not, and as the defendant believes, could not, shew even a title to the 300 acres, which defendant was willing to convey to him in consequence of the entry made in his testator's books; much less to any other portion of the lands to which he now pretends to set up a title. That the contract for the 473 acres was a fair, just and honest contract, made with a view to accommodate *Vance*, in many respects; particularly as the defendant sold the land to him for less than he could have gotten from other purchasers. That *Vance*, so far from pretending to establish a claim for more than 300 acres, expressed his regret that he had *not* purchased the whole of *Dr. Walker*, as he might then have gotten them for 11% per hundred acres.

Thus the principal charges in the bill are expressly denied by the defendant's answer, and I consider the execution of the deed of conveyance by *Walker*, and the acceptance of it by *Vance*, and his executing bonds, for payment of the purchase-money, in the year 1800, long after the statute of frauds, as an adjustment of the business, and a consummation of their contract, and completely binding between the parties: and not to be shaken or disturbed by oral testimony; especially that of witnesses, who appear to me to be interested, having disputes themselves of a similar nature with the defendant, and a strong bias on their minds in favour of the complainant; and speaking of loose conversations about the time of executing the contract. The admission of such evidence, on this occasion, would, in my conception, be opening a wide door to the very mischiefs contemplated, and so wisely guarded against, in our act to prevent frauds and perjuries.

Had the parties not considered the business as finally closed at the time of executing the contract, how easy would it have been to have made a short memorandum in writing on the back of each bond, expressive of any future expectation or intention of the parties; or a note or memorandum in writing on a separate paper signed by *Walker*,

to that effect ; neither of which having been done, I am of opinion that the decree is correct, and ought to be affirmed, which is the opinion of a majority of the Court.

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The following was entered as the decree of the Court.

" A majority of the Court is of opinion, that an agreement, concerning the purchase of lands, perfected by the execution of a conveyance on the part of the seller, and by the acceptance thereof, and the payment of the purchase-money, or execution of a bond or bonds for the same, on the part of the purchaser, is final and conclusive, between the parties and their heirs, in *law* ; and ought not to be disturbed in *equity*, unless fraud, or some manifest mistake in such conveyance, or bond, be shewn and proved ; or unless some note or memorandum in writing be made, pursuant to the statute of frauds and perjuries, (if subsequent to that statute,) at the time, or after the execution, of such conveyance or bond, whereby it may appear that the parties had agreed to some further explanation or modification of the terms of agreement as therein expressed. Upon these grounds, the Court is of opinion that the said decree is right," &c. Decree AFFIRMED.

Turberville against Long.

THIS was a writ of error to a judgment of the District Court of *Fredericksburg*, rendered in favour of the defendant in error, who was the demandant in that court in a writ of right.

If the original writ be lost, so that it cannot be made a part of the record, the Court will intend after

verdict, that it was a good writ, though some of the subsequent process be erroneous.

Appearance and pleading to the *action* cures all errors in the *process*.

It was not necessary in actions in the District Courts to aver in the declaration that the cause of action arose *within the jurisdiction of the Court* ; but it seems that such averment is necessary in actions in *Corporation Courts* only.

What circumstances are sufficient to cure the omission to mention in the count, on a writ of right, the County where the land lies.

A count on a writ of right, referring to boundaries, as by a survey made in the cause, sufficiently describes the boundaries of the land in dispute.

If the record of proceedings on a writ of right state that the demandant "replied" generally, the Court will intend, after verdict, that a general replication was filed in writing.

The statute of *jeofails* extends to writs of right : therefore, if the verdict and judgment be substantially right, though not in the words of the law, they ought not to be disturbed.

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Ware Long sued out a writ of *præcipe quod reddat*, against *Martha Turberville*, to recover a tract of land, lying in the county of *Caroline*. The original writ does not appear in the record, the clerk certifying, as a reason for not inserting it, that one half was lost by the jury or counsel, at the trial.

The tenant not being found, an *exigi facias* for 1165 acres of land was awarded, directed to the sheriff of the county of *Caroline*, in which the land lay; and the tenant not residing therein, it was ordered that a copy of the said writ of *exigi facias*, should be published in the *Virginia Gazette*, according to law, which was accordingly done, and due returns made. The writ was returnable to *September* term, 1799; and in *May* term, 1800, an order was made for a survey. Next follows the count; which lays the *venue*, in the margin, thus: "*Caroline County, to wit.*"

It demands "one tenement containing 1170 acres," (the quantity contained in the plat returned under the order of survey,) "bounded by the lines of the survey made in *this cause*, beginning at the letter A. in the said survey; and "thence to the letter B." &c. (pursuing the description, by calls for the letters to the beginning at A.) It is not averred, in any part of the count, that the lands lie *within the jurisdiction* of the Court. The plea of the tenant defends her right to the tenement, "containing" — acres of land, "bounded by the red line, in a survey, returned in *this cause*, to begin at a white oak, where the red line from "*Ware creek*, to red B. crosses;" and so the description proceeds in *terms* to make the reference applicable to a different plat from the one referred to in the count. The plea then proceeds "and as to the *residue* of the tenement in "the said *Ware Long's* count, contained," &c. she disclaimed tenure and title.

To which plea the record states, "*the demandant replied generally.*"

The jury found a verdict in these words:

"We of the jury find that the demandant hath more right to demand the land in the count and plea mentioned, than the tenant hath to hold."

Judgment was rendered for the lands, as described in the count from letter to letter, making the figure stated in the plat and certificate of survey.

The cause was argued in November, 1808, by *Warden, Randolph, and Williams*, for the plaintiff in error, and by *Botts and Wickham*, for the defendant. The counsel for the plaintiff in error, took a number of exceptions to the proceedings in the cause; all of which, it was contended by the counsel for the defendant, were waived by the appearance and pleading of the tenant in the Court below; and the errors, if any, cured by the verdict. But the case is so fully gone into by Judge TUCKER, in giving his opinion, that it is unnecessary to repeat the arguments at the bar.

Saturday, March 11, 1809. The Judges delivered their opinions.

Judge TUCKER. Multifarious have been the exceptions taken by the appellant's counsel, to the proceedings in this case, in the District Court, as well on the part of their own client, as their adversaries'. And perhaps there is not one which might not have been sustained on a demurrer: or which might not have been fatal to the demandant's action, had it not been aided or cured by the conduct of the tenant. I shall begin with the first, in the order of proceeding, though, I think, it obtained only the ninth place, in the order pursued by the appellant's counsel.

This was a writ of right, brought to recover lands lying in the County of *Caroline*. The original writ is not in the record, the clerk certifying that one half of it was lost by the jury or counsel, on the trial, so that a copy thereof could not be inserted in the record, and it was contended that the Court had a right to suppose it to be erroneous, because a subsequent process was alleged to be wrong.

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The case of *Redman v. Edolph*, 1 *Saund.* 317. furnishes a complete answer to this hypothesis. In that cause, an *ejectione firmæ* was brought by an original writ; and on the record, on the issue roll, it was entered that the defendant was *summoned*, whereas it ought to be, that he was attached, from whence it was inferred, that the original writ was wrong. And this being moved in arrest of judgment, and the court being informed that no original writ could be found on the file, the defendant's counsel (as in the present case) contended, that the Court ought to intend, that there was such a *vitious* original writ as the record supposes, unless the plaintiff shews another original, which is good, and may warrant an amendment of the record; for, (as the record is,) it appears that the declaration is founded upon a vitious original, and therefore no judgment can be given for the plaintiff. But the Court said, that inasmuch as there is not any original to be found on the file, they would *intend*, after a verdict, that there was once a *good* original, which is now lost, and that the plaintiff's clerk had made a mistake in the recital of it; which, after verdict, is not material.

The next objection in the order of proceeding, is to the writ of *exigi facias*; to which I shall give the same answer which the counsel who made it gave to a similar objection, made in another cause, the *same day*; that appearance and pleading to the action, cures all defects and errors in process.

The next in order was to the count, because it does not expressly state, that the lands lay in the County of *Caroline*: this may admit of three answers. First, the County is mentioned in the margin; secondly, if that be not sufficient, the Court, after a verdict, will intend, that it was so stated in the original writ, which has been destroyed; thirdly, the defect, if not cured by either of these circumstances, is completely aided by the tenant's plea, which defendeth the demandant's right, "in the tenement *aforesaid*, with the appurtenances, as of right, *namely*, of the tenement containing — acres of land in the county of *Caroline*."

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A second objection to the count is, that it doth not aver, that the lands lie *within the jurisdiction of the Court*. A satisfactory answer to this objection may be found in the reasons given by the late President of this Court, in support of his opinion in the case of *Thornton v. Smith*, (1 Wash. 81.) in which, although he was overruled, as to the necessity of averring jurisdiction in *Corporation Courts*, especially in actions transitory, he has clearly demonstrated to my judgment, that the precedents in that case, and in *Winder v. Eddy*, (*Ibid.* 87.) and in *Pride v. Hill*, cited by him, (*Ibid.* 83.) ought to be confined to cases arising within the narrow limits of those inferior jurisdictions, and not extended to superior Courts, or even to the County Courts, otherwise we may have writs of error without number, from every quarter of the country, for want of this averment. I will add another reason; the District Court law is a public law, of which the courts are bound judicially to take notice: by reference to that law, it must appear that the County of *Caroline* is within the jurisdiction of the SUPERIOR Court holden at *Fredericksburg*: and I cannot avoid seeing and noticing it.

A third objection to the count is that the boundaries of the lands demanded are not therein set forth; and the case of *Beverly v. Fogg* (1 Call, 484.) was cited and relied on. The judgment of this Court, in that case was, that there was error in this, that the boundaries of the land demanded in the count are not inserted therein, as required by law, *nor found by the verdict of the Jury*. From which it would seem that if they had been so found by the verdict, the omission in the count would have been cured. And I inclined to that opinion, since *id certum est quod certum reddi potest*, which probably was all that this Court thought requisite to the judgment. But without giving any opinion upon that point, here are boundaries inserted in the count, although by reference to a survey, previously made in the cause, on the motion of the demandant. The demand is of one tenement containing 1170 acres of land,

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bounded [as] by the lines of the survey made in this cause, beginning at the letter A. &c. The omission of the word [as] in the count, exposes it to the criticisms it received from the bar. But, *after a verdict*, the Court will not, at this day adopt the maxim, *qui cadit, in litera, vel in syllaba, vel in verbo, cadit in toto*. The demandant in my opinion descended to an unnecessary degree of strictness, in this recital of the boundaries of the lands he demanded. It would have been sufficient to have alleged the boundaries *generally*, as by the lands of A. B. C. and D. or by such a river, or such a creek, or water-course, and the lands of A. B. and C. The survey is intended to give the Court and Jury such minute and accurate information, as could neither conveniently nor without danger (as this case may prove) be inserted in the count. Nor is it at all important by whom, how, or when the survey thus referred to was made.

The demandant by referring to it, hath made it a part of his count; as much as if he had recited the lines in his patent, and referred to that for them. The tenant has proceeded in the same manner in her plea, and it is clear to my apprehension that the parties, the Jury, and the Court, perfectly understood both the one and the other.

But it was observed by the counsel who spoke last on the part of the appellant, that the tenant having disclaimed, as to *part*, judgment ought to have been that she should go thereof without day; for that the demandant might immediately enter thereon. This is the law, where the "*tenant UTTERLY disclaimeth from the tenancy in the land.*" *Litt.* sect. 691. But here this *disclaimer* is only as to a *part*, without saying *how much*, or what number of acres. (a) Being *uncertain*, and in *PART* only, I am of opinion the plaintiff was not bound by it. It seems to me like bringing money into Court, by a defendant, which the plaintiff may take out of Court, or not, at his election. If he does not, but goes on to the trial of the issue, and is nonsuited, he may lose the whole. And in this case if there had been a verdict for the tenant, the demandant might perhaps have been thereby forever barred of that part

(a) Sec Co.
Ent 308. a:

of the lands which she disclaimed title to, as well as the rest; notwithstanding the *disclaimer*. On this point, however, I mean not to give any opinion.

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We come now to the replication; it is thus entered: "to this plea the demandant by his attorney, replied generally; and thereupon the trial of the issue was referred till the next Court." The Clerk has added a note, that the replication is not *filed* in writing. It was his duty then not to have made the entry. But, after a verdict, I think this Court (if it be necessary) ought to intend that the demandant did reply generally, in *writing*, but that the Clerk neglected to *file* his replication. I say that this intendment should be made IF NECESSARY: but I am of opinion that where there is a negative and affirmative in pleading, a general formal replication in writing is not necessary according to the practice of our Courts in ordinary cases, and that the omission to *file* one in *writing* is cured by the verdict.

This brings us to the verdict and judgment. And I think the cases of *Vandervier v. Pendleton*, (1 Wash. 381.) and *Murray v. O'Neal*, (1 Call's Rep. 246.) furnish precedents that fully justify both. There can be no doubt that the statute of *jeofails* extends to this most important of all actions as well as to suits of inferior consequence. The reason is so much the stronger. I had almost overlooked an objection to the verdict, which was taken by Mr. *Williams*; that it finds ^R that the demandant hath more right "to demand the land in the count and plea mentioned, than the tenant hath to hold." Verdicts are held to be subject to the power of the Court, so as to mould them according to the true intent and meaning of the Jury, where that can be found responsive to the issue joined. The Jury have found the plaintiff had more right to demand than the tenant to hold the lands. The Court have said he had more right to have them as he demandeth them. One seems to be an irresistible consequence of the other. The case of *Murray v. O'Neal*, (1 Call, 246.) where, in ejectment, the Jury found for the plaintiff one cent damages, without say-

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ing any thing about the land as much stronger than this. Again, the reference to the plea, may be rejected, and was rejected, as surplusage by the Court; the judgment referring only to the lands in the count mentioned, as it ought.

I am therefore of opinion that the judgment be affirmed.

Judge ROANE said that he could see no error in the judgment.

Judge FLEMING. The judgment is to be AFFIRMED by the unanimous opinion of the Court.



Tuesday,
March 14.

Hoover against Donally and others.

If a derivative purchaser, by assignment of a title bond, file his bill against the vendor for a specific conveyance, the first purchaser or his representatives ought to be made parties.

In a suit against a person alleged to be a purchaser with notice, it is not sufficient for the defendant in his answer to say that he had no notice of a prior equity at the time of the purchase. It must appear that he had no notice of the plaintiff's claim.

IN this suit, which was originally brought in the County Court of Greenbrier, the complainant, Hoover, stated in his bill, that a certain Christopher Miller purchased a tract of land of Andrew Donally, paid him part of the purchase-money, delivered him the bond of a third person, in part of the balance, and took his (Donally's) bond for a title; that Miller, in consequence of this bargain, took quiet possession of the premises, and raised a crop thereon; but that Donally afterwards forcibly turned him out of possession, and through his agent (Samuel Brown) sold the land to Charles Grattan; that Miller assigned the title-bond to Hoover, who thereupon tendered to Donally the sum 257l. 18s. 4d. being the amount of the principal and interest remaining due of the purchase-money, and demanded a conveyance, which he refused. The bill was therefore filed against Donally, Brown, his agent, and Grattan the purchaser of the land;

whether he had obtained a conveyance before he received notice of the plain-

interrogating the defendant, *Grattan*, particularly, whether (previous to his purchase; he did not know of the claim and purchase of *Miller*, and under what right or under whose claim he had obtained a right to the land in question, and praying a decree compelling the said *Donally*, *Brown*, and *Grattan*, or whichever of them the legal title should be in, to convey the same to the complainant, with warranty against themselves and their heirs: but *MILLER*, the assignor to the complainant was not made a party.

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The answer of *Donally* admitted the contract with *Miller*; and that he (the respondent) received, on account of the purchase, a mare, saddle and bridle, valued at 30*l.* and the bond of *William Cocke* for 150*l.* but that *Cocke* refused to pay it, and charged *Miller*, by a written notification, with fraud in obtaining it; that *Miller* on receiving this notification, promised to try and make up the money; and of his own accord, without the permission of the respondent, went on the land; that on being pressed for payment, he said he was totally unable to comply with his contract, and requested to be released from it; to which the respondent assented, having no kind of security for the money; that *Miller*, in consideration of the respondent's trouble and expenses, in going as his agent to collect the bond of *Cocke*, as well as of the failure of that application, and of the death of the horse which the respondent rode, agreed to relinquish in toto the first payment of 30*l.* made as aforesaid; and voluntarily moved off the land, and left the State; that the respondent returned to him the bond of *Cocke*; but that *Miller* fraudulently retained the title-bond, and afterwards assigned it to *Hoover*, who went in pursuit of him for the purpose of obtaining it, though before his taking the assignment he had repeatedly mentioned to the respondent, that *Miller* had told him he had relinquished the contract altogether; that the sale to *Grattan* had actually taken place, and full satisfaction been made to the respondent by him before the tender of the money by *Hoover*; which transaction was charged to be vexatious, deceitful, and fraudulent.

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Donally.

The answer of *Brown* acknowledged that he had sold the land to *Grattan* under a power from *Donally*; and *Grattan*, in his answer, averred that he did not know of *Miller's* claim previous to his purchase from *Brown* acting in behalf of *Donally*; that the only right by which he claimed, was derived from *Donally*, who was the only person under whose claim he had obtained a right to the lands in question: but whether any deed had been made to him (*Grattan*) did not appear from the bill, answers, or evidence in the record.

The other circumstances in the case have no relation to the points decided by this Court, and therefore need not be mentioned.

The County Court decreed a conveyance to the plaintiff on his paying 257*l.* 18*s.* 4*d.* The defendant appealed to the Superior Court of Chancery for the *Staunton* district; where the decree of the County Court was reversed; the bill dismissed with costs as to *Brown* and *Grattan*; and an account directed as to the payment made by *Miller* to *Donally*, and the expenses of the latter in going to collect *Cocke's* bond: from which decree *Hoover* APPEALED to this Court.

Wirt,⁽¹⁾ for the appellant, and *Call*, for the appellees, argued on the merits; but, it appearing from the objections made on both sides, that the cause was not ripe for decision, the Court, after consideration, unanimously entered the fol-

(1) *Wirt* observed that the condition of *Donally's* bond was to convey at or upon payment of the purchase-money. He said there was no abandonment of the contract; and that, in cases much stronger, where a day for payment was fixed, and had passed, still the Court would decree a conveyance. 1 *Atk.* 12. *Gibson v. Patterson* and others. 4 *Bro. Ch. Rep.* 329. *Pincke v. Curteis.* 1 *Ves. jun.* 221. *Calcraft v. Roebuck.* 3 *Ves. jun.* 625. *Conolly v. Parsons*, in note. *Sugd. on Vendors*, 255. He objected that *Grattan* did not appear to have a deed or any legal title. If he had it, he should have shown it, that its date might appear; and should have expressly denied notice of *Miller's* prior claim at the time when he received his deed. *Sugd.* 487. 507. 513. *Grattan*, then, having only an equity, could not prevail against *Miller's* right, under which *Hoover* claimed; for the rule is that be-

lowing decree : " That the record is too imperfect to enable the Court to decide the cause, as well from the want of a necessary party (to wit, *Christopher Miller*) to the suit, as from its not appearing with sufficient certainty whether the appellee *Grattan* had obtained a legal conveyance for the lands and tenements in controversy, prior to his having received notice of the appellant's claim ; and consequently, that no final decree ought to be made therein until those defects are supplied." " Both decrees REVERSED, and cause remanded to the County Court to be further proceeded in according to the principles of this decree."

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Corbin's Administrator against Southgate.

Wednesday,
March 15th.

CHRISTOPHER HARWOOD sold a negro slave to *John T. Corbin* for 130 barrels of corn, and for value received of *John Southgate*, gave him a written order for it, which was accepted by *Corbin*. Part of the corn was delivered when applied for ; but the balance refused. *Southgate*, after the death of *Corbin*, brought an action of *assumpsit*, in the County Court of *King and Queen*, against his administrator with the will annexed ; charging in his declaration, that the said *John T. Corbin* in his life-time be-

A general acceptance of an order binds the acceptor to the payee by whom the same was taken, *bona fide*, and for a valuable consideration paid by him ; notwithstanding the consideration, which induced the acceptance, afterwards fails, without any fault on the part of the payee.

tween two equities, he who is prior in point of time is prior in point of right.
2 Fonb. 301. Sugd. 487.

Call, contra, insisted that the evidence of abandonment of the contract was complete ; and that *Grattan's* answer was sufficient as to the point of notice, being directly responsive to the allegation in the bill on that subject, and denying notice in the same terms in which notice was alleged ; but he admitted that *Miller*, a proper party, was not before the Court. *Howard's Exchequer*, 226. citing 2 P. Wms. 643.

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ing in possession of 130 barrels of merchantable *Indian* corn, had, "for a valuable consideration to him paid by "*Christopher Harwood*, undertaken and to the said *Christopher Harwood* promised to deliver the same to him, or "to his order, and, in consideration thereof, and of a "valuable consideration to the said *Harwood* paid by the "plaintiff," the order was drawn in his favour; the acceptance of which order by *Corbin*, the plaintiff's application for the corn, the delivery of part, and refusal to deliver the rest, were all specially set forth and averred.

The defendant pleaded *non-assumpsit* by the testator; and, on trial of the issue joined thereupon, a witness for the plaintiff being interrogated by his attorney as to the proof of the debt from *John T. Corbin* to *Christopher Harwood* before the order in the declaration mentioned was made, proved the purchase of the negro as aforesaid to have been the foundation of *Corbin's* acceptance of the said order: the defendant then offered to prove that the negro, when sold, was not the property of *Harwood*, and, after the order was accepted, had been taken by him, as agent for his sister, *Anne Harwood*, out of *Corbin's* possession, and had ever since been kept and detained by the said *Anne Harwood* as her property; which evidence the Court refused to permit to go to the Jury; whereupon the defendant filed a bill of exceptions, and (a verdict and judgment having been entered for the plaintiff) took an appeal to the District Court, where the judgment being affirmed, he again appealed to this Court.

The *Attorney-General*, for the appellee, relied on *Corbin's* acceptance of the order as obligatory upon him, and quoted the case of *Pillans & Rose v. Van Mierop & Hop-*

(a) 3 Burr. kins.(a)
1663.

The consideration on which the acceptance was founded was sufficient, notwithstanding *Corbin* was evicted of the slave: for a loss to the plaintiff, without any gain to the defendant, is sufficient to support an *assumpsit*. *Harwood* was indebted to *Southgate*, and willing to pay him by an

order on *Corbin*, whose acceptance suspended *Southgate's* right to sue *Harwood*. This suspension was a loss to *Southgate*, and entitled him to claim of *Corbin*.

The doctrine is laid down by *Kyd* on *Bills of Exchange*, p. 74. and by Lord *Mansfield*, in *Mason v. Hunt*,^(a) that, "if one man, to give credit to another, make an absolute promise to accept his bill, a third person who should advance his money upon it would have nothing to do with the equitable circumstances which might subsist between the drawer and acceptor." But this is a stronger case: for, here, there was not only a promise to accept, but an actual general acceptance.

The cases of *Buckner* and others v. *Smith* and others, and *Holmes*, executor of *Elliott*, v. *Smock*,^(b) come up to this in principle. In each of those cases, a bond was given upon consideration of unlawful gaming; yet the obligor, having induced a third person to accept an assignment, was bound to pay. The equity of *Corbin* is against *Harwood*, and he should have gone against him in Chancery; for the rights of *Harwood* could not be decided in the suit between *Southgate* and *Corbin*, to which he was not a party; but, in equity, he would necessarily be a party.

Besides, the bill of exceptions is incomplete: no evidence appears of a lawful recovery of the slave from *Corbin*. Proof that he was taken out of his possession is not sufficient; because such taking might have been *tortious*.

On *Friday*, the 17th of *March*, by the unanimous opinion of the Court, the judgment was **AFFIRMED**.

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(a) *Doug.* 299.

(b) 1 *Wash.*
296. and 360.

Claiborne and Wife *against* Henderson and others,
and Henderson and others *against* Claiborne and
Wife.

Before our
act of Assem-
bly, (of 1785,
which took
effect the first
day of Janua-
ry, 1787,) giv-
ing a widow
dower of a
trust estate,
she was not
dowable of an
equitable es-
tate.

ON cross appeals from a decree of the Superior Court of Chancery for the *Richmond* District, pronounced by the late Judge of that Court.

This cause involving the important question whether a widow was dowable of an *equitable* estate of inheritance before the operation of our act of Assembly, expressly giving her dower in a *trust* estate,(1) which has been determined in the negative, in *England*, as *Blackstone* says, "more from a cautious adherence to some hasty precedents than from any well grounded principle,"(2) was argued on the 25th, 27th, 28th, and 29th of *October*, 1806, on the general doctrine; and again on the 19th, 22d, 23d, and 25th of *April*, 1808, on the particular question submitted by the Court, whether from the facts disclosed, the husband was not seised of a *legal* estate, although there was no proof that he ever received a *deed* from the person of whom he purchased.

William Claiborne, and *Frances*, his wife, late *Frances Black*, brought their bill in the High Court of Chancery, claiming dower of a tenement in the town of *Alexandria*, as of the estate of *William Black*, Mrs. *Claiborne's* former

(1) This act first passed in 1785, and took effect the first day of *January*, 1787. It declares that "where any person to whose use, or in trust for whose benefit another is or shall be seised of lands, tenements, or hereditaments, hath or shall have such inheritance in the use or trust, as that, if it had been a legal right, the husband or wife of such person would thereof have been entitled to curtesy or dower, such husband or wife shall have and hold, and may, by the remedy proper in similar cases, recover curtesy or dower of such lands, tenements, or hereditaments." See *Rev. Code*, vol. 1. c. 90. s. 16. p. 159.

(2) 2 *Black. Com.* 337.

husband. The original bill was filed, in *November*, 1786, and stated the principal circumstances ; but the dates and names of the parties defendants were left *blank*. In *July*, 1791, another bill was filed specifying more particularly the grounds of their claim, and making *Alexander Henderson* and others, executors and trustees of a certain *Thomas Kirkpatrick*, and *Dennis Ramsay*, a purchaser of the lot in question, defendants. The complainants charge that *Black* purchased the lot No. 26. with its appurtenances, in the town of *Alexandria*, of a certain *Allen M^rRae*, and paid him the purchase-money ; that a conveyance was made by *M^rRae* to *Black* for the same, and confided to a certain *William Eitzey*, attorney at law, for the purpose of having it recorded in the proper Court, but this was never done ; that *Black* afterwards sold the lot to a certain *Thomas Kirkpatrick*, and in 1773, conveyed it to him by deeds of lease and release, which were duly recorded in the General Court ; that at the time of the purchase and sale of the said lot by *Black*, the complainant, *Frances*, was his wife, and neither joined in the conveyance, nor does her name appear in any part of it ; that *Black* departed this life in *January*, 1782, having first made his will, but the complainant, his widow, relinquished all benefit under it, within nine months after his death, and adhered to her legal title of dower in his estate ; and that the complainants intermarried in *April*, 1783. The bill concluded with stating the death of *Kirkpatrick*, the appointment of *Henderson* and others his executors and trustees, the sale of the lot by them to *Ramsay*, the annual rents of the lot, and the refusal of the defendants to allow the complainants' claim of dower ; and prayed an assignment of dower out of the lot, and one-third part of the profits since the death of *Black*. *Henderson* answered, and admitted that he was appointed, together with several others, trustees and executors of *Kirkpatrick*, but disclaimed all interference with his estate, having, in open Court, renounced the executorship. He denies any knowledge of the purchase charged to have been made by *Black* from *Allen M^rRae*, or of the conveyance from

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—

Black to *Kirkpatrick*; but states that the executors of *Kirkpatrick*, finding the legal estate in the lot to be in *Allen M'Rae*, procured from his only surviving son, *John M'Rae*, a deed for the same, in the year 1786. This answer was filed in *October*, 1792; and, in *April*, 1800, the complainants filed a supplemental bill referring to their former bill and the answer of *Henderson*, and stating, as additional circumstances not known before, that *Kirkpatrick* died sometime in the year 1785, having previously made his will, by which he conveyed the *residuum* of his estate, comprehending the lot in question, to his executors, in trust, for the benefit of his sisters; that the conveyance from *Allen M'Rae* to *Black* having been lost, the executors of *Kirkpatrick*, obtained a deed from *John M'Rae*, the heir at law of *Allen M'Rae*, written by *Henderson*, one of the executors of *Kirkpatrick*, reciting the conveyance from *Black* to *Kirkpatrick*, but alleging that it did not appear that *Allen M'Rae* ever made any deed to *Black* for the lot, although *they all well knew that such deed had been made*. This bill further charged that *Ramsay* had relinquished the possession of the lot, with the approbation of the executors, and that it was then occupied by *William Wilson* and *James Kennedy*, who became possessed thereof *since the exhibition of the original bill of the complainants*; and who are made parties to the supplemental bill.

The answer of *Ramsay*, states that, in *September*, 1785, he purchased part of the lot in question at a public sale, made by the executors of *Kirkpatrick*; but finding the title to be defective, he gave it up to them; and did not know at that time that there was any dispute about their title. *James Kennedy* answered, and admitted that he purchased the lot from the attornies in fact of *Kirkpatrick's* executors, in *September*, 1795, and sold one-half of it to *William Wilson*, upon which they jointly built a valuable house, and that the first intimation he had of a dispute in the title was from the *subpœna* which the complainants served upon him. The answer of *Wilson* accords with that of *Kennedy*. The answer of *John Gibson*, one of the acting executors of *Kirk-*

patrick, denies that *Black* ever had a legal title in the lot. On the contrary, he infers from some letters of *Black*, dated in 1767, addressed to *Kirkpatrick* and others, and from an account and memorandum taken from the books of his testator, (which were annexed to the answer,) that '*Black* never had a deed for it; from which documents it also appears that so far from suggesting that any deed had ever been obtained, or had been lost, *Black* requested payment of the purchase-money from *Kirkpatrick*, (amounting to 150*l.*) and offered any reasonable security for a title, if the executors of *M·Rae* had not already made a conveyance; that payment was refused by *Kirkpatrick*, in 1767, on the ground of *Black's* not being able to make a title; but that the money was paid in 1772; that the lot was sold at public auction by *William Ellzey* and *William Grayson*, agents of *Black*, in *June*, 1766, payable in *June*, 1767, and that *Kirkpatrick* had tendered the money, at the last mentioned date, both to the principal and agents; and demanded a conveyance; which not being made, he considered himself discharged from the interest, which, however, was afterwards allowed. This answer further states, that the defendant never heard any thing of the title of *Black*, but from the suggestions of the complainants' bills; and that the deed from *Black* to *Kirkpatrick*, in 1773, was merely intended to convey the equitable title of the former. He expresses his belief that in 1766, when the equitable title of *Black* was sold to *Kirkpatrick*, the complainant *Frances* was not the wife of the said *Black*; and that he knows of no title to the lot, except what is derived from the contract of *Allen M·Rae*, and the execution thereof to the representatives of *Kirkpatrick*, by *John M·Rae*. *Alexander Henderson* also answered the supplemental bill, and denied any agency in procuring the deed from the heir of *Allen M·Rae* to the trustees of *Kirkpatrick*. He repeats the declaration made in his former answer, that he never intermeddled with the affairs of *Kirkpatrick*, and states his information and belief that in the year 1766, when *Black* sold to *Kirkpatrick*, he had not then intermarried with the complainant *Frances*.

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John M^rRae, who was called on, in the supplemental bill, to disclose whatever information the books and papers of his father, *Allen M^rRae*, would give on the subject, declared in his answer, that he never had found among the papers of his father any writing or memorandum from which he could infer that a deed had ever been executed to *Black* for the lot in question ; nor had he ever understood, except from the complainants' bill, that such conveyance once existed. From the intimacy and friendship which he had been informed always subsisted between his father and *Black*, and from their correspondence on the subject, he is confident that in the year 1760, there was no conveyance ; and from 1764 to 1766, he believes a conveyance was not desired, but suspended in order to be made to a purchaser, who seems to have been sought for within the latter period. To the answer of *John M^rRae* is annexed two letters of *Black* to *Allen M^rRae*. In the one, bearing date the 22d of *May*, 1760, *Black* speaks of his lot in *Alexandria*, and requests *M^rRae* at any time soon to speak to a Mr. *Johnston* to draw a conveyance from *M^rRae* to *Black* for it. In another, dated the 3d of *November*, 1764, *Black* acknowledges the receipt of a letter from *M^rRae*, inclosing *Kirkpatrick's* account, which he says he could not agree to, nor would he take the rent offered by *Kirkpatrick* for the time he occupied the house ; that, unless *Kirkpatrick* would give 15*l.* per annum, he might give up the lot as soon as he pleased ; and if the place could not be sold to any advantage then, and *Kirkpatrick* or any other would agree to take it on a reasonable rent for any time, he would consent to have certain improvements made, and advance 100*l.* in part thereof. Of the expediency of selling at that time, *Black* requested the opinion of *M^rRae*, and adds, by way of post-script, that, since writing, he had received of Colonel *Lee*, in part of rent due from *Kirkpatrick*, the sum of 27*l.* 17*s.* 6*d.*

From the depositions and exhibits filed in the cause, together with the bills and answers, it appears that *Black* intermarried with the complainant *Frances*, on the 11th of

February, 1762. On the 23d of *January, 1782*, his will is dated; and his widow, by an instrument in writing, dated the 14th of *May, 1782*, and reciting his death on the 26th of *January*, preceding, renounced the provision made for her by the will of her deceased husband. At what time the complainant *Claiborne* intermarried with the widow of *Black* does not appear, except from the allegations of the second bill, which state the marriage to have taken place in 1783. *Black* appears to have been in possession of the lot in 1760, under a purchase from *Allen M^r Rae*, but the consideration paid does not appear; nor is there any writing evidencing the purchase, except *Black's* own letters; which purchase, however, was not denied by any of the parties, and is proved by general reputation to have taken place. From 1760 to 1766, *Black* received the rents from *Kirkpatrick* to whom he sold the property, at the last mentioned date: the purchase-money was paid by *Kirkpatrick* in 1772, (after having refused payment in 1767, on account of the want of a title,) and in 1773 *Black* executed a deed to *Kirkpatrick* for the lot, with the usual covenants, which was acknowledged and recorded in the General Court; but *Mrs. Black the present female complainant was not a party; nor does it appear that Black ever had a deed himself.* *Kirkpatrick* died on the 13th of *January, 1785*, having by his will, dated on the preceding day, devised the lot in question to trustees for the benefit of his sisters. In *September, 1785*, *Ramsay* purchased it at public sale, but afterwards relinquished the possession to the executors, on account of the defect in the title. In *September or October, 1795*, it was again sold, and purchased by *Kennedy*, who sold one-half to *Wilson*; they pulled down the house standing thereon, and built another valuable one, in which they used the materials of the old house. This suit was brought for dower in the lot, against the trustees and purchasers, all of whom deny notice of the complainants' claim.

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The Chancellor, (the late Mr. Wythe,) after an elaborate opinion, in which he supposes that our act of 1785, giving a widow dower in a trust estate, was a declaration by the Legislature of what a Court of Equity ought to have done before the passing of the act, pronounced a decree by which he sustained the jurisdiction of the Court, and appointed commissioners to assign the complainants' dower in the lot, and to take an account of the profits, *declaring at the same time, that a widow ought not, against a purchaser, to recover profits of her dower, from a time earlier than the day when her count or bill was filed in Court; and that, against the PROFITS which the demandants might recover, the tenants were entitled to a discount of so much. (on account of what the demandant Frances received for her dower and distributive share of her former husband, William Black's slaves and goods, chattels and credits) as is equal to one-third part of the damages which might be assessed for his breach of the covenant contained in his deed (of 1773) to Kirkpatrick; for ascertaining which damages an issue was directed.*

The complainants appealed because the decree did not give them dower *from the death of William Black, without any deduction*; and the defendants appealed because *any dower whatever* was decreed.

Botts, for the original defendants in equity, contended that the estate of *Black*, in the lot in question, was merely an *equitable* one, of which a widow cannot be endowed. All *equitable* estates may be resolved into *trusts*; which are of three kinds: 1st. Such as are raised by a Court of Equity, without the aid of a deed. 2dly. Such as are implied by Courts of Equity, upon a deed. 3dly. Such as are expressly declared by deed. The present case falls within the *first class of trusts*. *Allen M. Rae* was a *trustee* for *Black*, without deed expressing or leading to a use.

There is no case in the *English* books, presenting a claim to dower in an estate possessed by the husband under the first class of trusts. The silence of the reporters and

elementary writers on the effect of such a demand, proves that the Courts and the profession concurred in the opinion that it could not be supported. Questions of dower upon such of the second and third classes of trust estates, as were not executed by the statute of uses, have been frequently agitated in the *English* Court of Chancery; and, with the exception of one or two cases, which have been since overruled, it was determined that the widow was not entitled to dower; although her claim was certainly much stronger, where the *equitable* title of her husband was secured by deed, than where it was not. [Here Mr. *Botts* cited the following authorities. 3 *Black. Com.* 432. 2 *Black. Com.* 132. *Christian's* note (11). *Ibid.* 337. *Christian's* note (13). 1 *Bro. Ch. Ca.* 326. *Dixon v. Saville* and others. 2 *Bac. Abr. Gwil.* ed. 361. 371. *Prec. in Cha.* 336. *Bottomley v. Lord Fairfax.* *Cas. temp. Talbot*, 138. *Attorney-General v. Scott.* *Rep. temp. Finch*, 368. *Extor v. St. John*, cited 9 *Vin.* 226. pl. 54. 9 *Vin.* 229. pl. 12. 1 *W. Black. Rep.* 138. in *Burgess v. Wheate.* *Pow. on Mortg.* 717. 4th ed. 3 *P. Wms.* 229. *Chaplin v. Chaplin.* 2 *Atk.* 526. *Godwin v. Winsmore.* *Perkins*, s. 373. 366. 369. 368. 6 *Co.* 34. a. *Fitz-William's case.* *Co. Lit.* 31. b. *F. N. B.* [150.] 2 *Tuck. Black.* 131. note 15.]

At law, the right of dower is confined to a seisin of an estate of inheritance in the husband; either an *actual* seisin by possession and *title*, or a *constructive* seisin by legal title and right of possession. (a) Courts of Equity have never extended those rights beyond the legal limits; and, on principle, the same rules ought, and do prevail in both Courts. (b)

It being clear, then, that this demand would have been resisted by the *English* Courts, the next inquiry is, whether any of our own statutes recognised their rules of decision. By the act of 1705, (c) it is declared that a widow shall be endowed as "prescribed by the laws and constitutions

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(a) 2 *Black. Com.* 127. 131. *Co. Lit.* 31. a. *Lit. s.* 681. s. 86.

(b) 3 *Black. Com.* 432. *Cases temp. Talb.* 138, 139, 140. *Attorney-General v. Scott.*

(c) 1 *Virg. Laws*, ed. 1769. p. 31. s. 8.

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(a) *Sess. Acts*,
c. 62. and *Rev.*
Code, vol. 1. c.
90. s. 16. p.
159.

(b) 1 *Wash.*
139. *Turner*
v. *Turner*. 3
Call, 122. *Commonwealth* v.
*Beaumar-
chais*.

(c) 1 *Fonb.*
413, 414.

"of the kingdom of *England*." The act of 1785, (a) which passed after the supposed right of the complainant, *Frances*, accrued, contains a strong expression in favour of the claim of dower in the second and third classes of trusts before defined ; but that law can act prospectively only ; (b) and does not apply to the first class of trusts.

Had not the law been solemnly settled against the right of the widow, in this case, her claim must have been repelled by the Court, even if it had been against the heir : for either the heir or his ancestor might have elected to vacate the purchase, or sue *M^r Rae* for breach of contract in not conveying the legal estate. Such an action would have affirmed the legal estate in *M^r Rae*, discharged of all equity : nor could the Jury have deducted the value of the widow's right from the amount of compensation for the entire breach. How then could the supposed title to dower, be reconciled to this right of election ? Upon the same principle which is to give the complainant dower, the wife of *Ramsay* (who bargained for the lot, and relinquished the contract) is entitled.

The maxim that *what ought to have been done, shall be considered as actually done*, will be relied on by the opposite counsel ; but it has no application to the present case. (c) Even if it did apply, no one could take benefit of it, but *Black* or his heir. This maxim, though comprehensive in its terms, is of very limited application. A testator *ought* to subject his real estate to the payment of his debts ; and Lord *Mansfield* has said that he sinned in his grave, if he did not : yet if he failed to do what he ought to have done, a Court of Equity could not, by the magic of the maxim, consider it as having been done, and decree the land to be sold for the payment of his debts.

But if the complainant *Frances* could be endowed against the heir of her late husband, or against a purchaser *with notice*, she cannot recover against a purchaser who has united the legal and equitable estates without notice of the marriage, or against the vendee of such purchase,

though such vendee should have had notice.(a) Notice, to bind a purchaser, as all the cases agree, ought to be express. The *blank* bill filed in this case, was not a notice, either implied or expressed, *of any thing*, or *to any one*.

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It would be iniquitous for the complainants to recover against the tenants, who have paid full value for the land, upon a clear legal title, deduced without making *Black* a link in the chain. If any be bound to the widow, they are the representatives of her husband. But her claim against them would be opposed to all equity. She has enjoyed in her family the proceeds of sale; or those proceeds have increased the personal estate of her husband, of which she has had her distributive share, *not for life only*, as the dower would have been, *but forever*. Ought she to have one-third of the land, and one-third of the money also, for which it sold?

(a) 2 Fonb. 152.
1 Wash. 217.
in *Hoe & Harrison v. Pierce*. Ibid. 336. 339.
Southall v. McKeand, &c.

The allowance of the present claim would be productive of incalculable mischief. The wives of speculators who bought, sold, and exchanged with such rapidity as to make it burthensome to their traffic to take conveyances as they went along, would rob the innocent holders, of dower-rights, in succession, to the ruin of their estates. The widow of every assignor of a land-warrant, or a survey, would be entitled to dower. The whole capital of a married speculator would be many times exceeded, by the drafts of his widow upon those on whom he had imposed: and many estates would be cut up into parcels of dower, so as to leave nothing but fragments and reversions!

On the question whether a parol bargain and sale, before the statutes of frauds, would not have vested the legal estate; *Mr. Botts* argued, that before writing came into general use, feoffments by parol were adopted from necessity. But to give notoriety to the transaction, the ceremony of livery of seisin was resorted to. On the same principle, the common law regarding the importance of a public investiture, would not permit dignities to pass without instal-

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lation, nor rectories or vicarages without induction. These acts were so essential to the alienation, that, without them, the new possessor was merely a tenant at sufferance. Courts of Equity; indeed, very early raised a use, upon a parol bargain and sale for valuable consideration, by giving the *profits* of the estate to the bargainee, or decreeing a conveyance as the occasion required. Then came the statute of uses of 27 *Hen. VIII.* c. 10. which, by transferring the possession to the use, would have been productive of all the evils of a parol feoffment without livery of seisin, by the introduction of simple and private parol alienations; but in the same session of Parliament, the statute of enrolment 27 *Hen. VIII.* c. 16. passed, which declared that a use should not be executed by the statute, unless the conveyance were by deed indented and enrolled in one of the King's Courts of *Westminster*. Our act of 1710, (a) expressly declares that *no estate of freehold* shall pass, but by deed in writing, indented, sealed and recorded, as by that act prescribed. Language could not have been used more effectually to annul a bargain and sale, without writing, indenting, sealing and recording. The exception in the 4th section, that the contract shall be binding between the parties, though the deed were not recorded, relates to the cases of *deeds* only.

(a) *Brown*
Virg. ed. 1733.
p. 257. and
1769. p. 142.

But if the plaintiffs had any remedy, it was at law; and the failure to except to the jurisdiction of the Court of Equity, cannot confer jurisdiction.

Edmund J. Lee, on the same side, argued the cause very fully, and very ably; but as all the principal points and authorities touched on by him, were necessarily considered in *Mr. Botts's* arguments, we have been compelled to condense, and exhibit the subject, as far as possible, in one distinct view.

Randolph, for complainants, said he would consider the argument of *Mr. Botts*, as founded on three positions, 1st. That a Court of Chancery has no jurisdiction in cases of

dower, generally. 2dly. The want of dowability in Mrs. *Claiborne*. And 3dly. The nature and extent of the relief.

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As a complete answer to the first objection he would only refer to the general learning on the jurisdiction of a Court of Equity, laid down by *Mitford*, (p. 109.) in which it will be found that not only in cases of *dower*, but of *account* and *partition*, Courts of Equity will entertain jurisdiction, although relief, but perhaps not so effectual, might be had at law. As to *precedent*; it has been done for years in this country, and sanctioned by this Court, particularly in the case of *Braxton v. Coleman*, which was a naked case of dower. Claiming dower in an equitable estate, it was proper for us to go into a Court of Equity.

The second objection is, that Mrs. *Claiborne* is not dowerable of an equitable estate. This objection will be examined on principles of law and equity, as well as of natural justice.

The matrimonial union creates an identity of husband and wife, both in law and equity. They are one in affection and devotion to each other. And as the personal property and labour of the wife go to the husband, *natural justice* gives her a claim to part of their joint acquisitions. By separating herself from all others, she has no other mode of acquiring a livelihood but by her husband. Although it is admitted that the municipal law must govern, yet its principles are not to be strained against such a claim. Even *Blackstone*, in the passage quoted, (2 *Black. Com.* 337.) expresses his surprise that dower had not been allowed out of a trust estate; and suggests that this has arisen more from a cautious adherence to some hasty precedents than from any well-grounded principle.

But it is said that the act of 1705, confers a right of dower according to the rules of the common law only. On a reference to that act, it will be found that a widow is to be endowed according to the "laws and constitutions of *England*;" implying the introduction not only of the rules of the common law, but the principles of equity. The

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oath of a Judge of the General Court in Chancery, before the revolution was, that he should do equal right according to equity and good conscience, "and the laws and usages of Virginia." He admitted that by the common law there must be seisin of the husband in deed or in law, to entitle the wife to dower; and because there was no seisin of a use at common law, the wife was not dowable of a use. So, while equity was immature, and after uses were turned into trusts by the statute, perhaps, the same doctrine prevailed. These circumstances, when the *English* books are examined, will solve all the mighty difficulty.

But equity very early adopted a principle, "that what ought to have been done, shall be considered as actually done." On this principle, Sir Joseph Jekyl, Master of the Rolls, so long ago as the year 1732, in the case of *Banks v. Sutton*, (2 *P. Wms.* 700.) decided that the wife was dowable of a trust estate. It is indeed afterwards said, that it is now settled, there can be no dower of a trust estate of inheritance, or of an equity of redemption of a mortgage in fee,(1) and to prove this the following cases are relied upon. 3 *P. Wms.* 229. *Chaplin v. Chaplin. Cas. temp. Talb.* 138. *Attorney-General v. Scott.* 2 *Atk.* 525. *Godwin v. Winsmore.* 1 *Black. Rep.* 138. *Burgess v. Wheate*, and 1 *Bro. Ch. Rep.* 326. But none of these authorities forbid dower in such a case as ours; and a note to *Cox's* edition of *P. Wms.* (vol. 3. p. 232.) to a report of the case of *Chaplin v. Chaplin*, clears up the difficulty and supports the authority of *Banks v. Sutton*. Courts of Equity will be found to have decreed dower of a trust in general; or where there is an equitable interest acquired, and no intention shewn by the purchaser to exclude the wife of dower, or to have left it upon general principles of equity. The principle laid down in *Banks v. Sutton*, has never been overruled; viz. that the wife is dowable of a trust estate unless there is an express intention to exclude

(1) See note to 3 *P. Wms.* 719. *Cox's* ed. Also note to page 139. of *Cas. temp. Talb.* 3d ed.

her. All the cases referred to by the counsel on the other side may be reconciled on this principle. And the *English* law may be stated to be, that where the husband holding an equitable estate, does not make a deed of trust to deprive the wife of dower, she is entitled to it.

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If the House of Lords, the dernier resort in *England*, has not sanctioned the decree of the Chancellor in opposition to the Master of the Rolls, in the case of *Banks v. Sutton*; or if the decisions of the *English* Courts are contradictory, this Court is left free to preserve the holy rights of the widow. Or if the decisions of their Courts are against us, we are not bound by them so far as to sanction iniquitous attempts to starve the wife. But by what laws is this question to be decided? Whether by laws prior or posterior to the revolution? If it is to be decided by laws prior to the revolution, then the Judges of the General Court acting under the influence of an oath to do right according to the *laws and usages of Virginia*, (which words are inserted in the oath of a Chancellor since the revolution,) have already settled the question. In the case of *Dobson v. Taylor*,⁽¹⁾ in the old General Court, *April*,

(1) *Dobson v. Taylor*, *April* General Court, 1755. Equity.

(*John Randolph's MS. Reports*, p. 77.)

Qu. If a woman is dowable of an equitable estate in her husband. By 1 *W.* 110. baron may be tenant by the curtesy of an equitable estate, and by 2 *W.* 634. *Banks v. Sutton*, and 638. same author, dower is more favoured than curtesy, because the former is not only a legal but an equitable and moral right. The reason of these cases is on two rules, viz. lands are looked on as money and *e converso*, and what is agreed and ought to have been done is looked on as done. *Attorney-General v. Scott*, *Talb.* 138. *Ld. Hardw.* in *Atk.* 528. says this is law, woman not dowable of a trust because before the statute she was not of a use, and since the statute trusts are the same as uses. *Sed nota*, that case is not dependent on the rules *ante*; the legal estate was in trustees and was to remain forever so, and the husband could only have the *unfruct*; but where there is an agreement to convey to the husband at a certain time, so that the legal estate ought to be consolidated with the equitable estate, there it shall operate as if it had actually been done. So that a woman is not dowable of an equitable estate that is to remain so forever, but may of one where that equitable estate ought to have been turned into a legal one.

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1755, it was decided that where the husband had an equitable estate, which ought to have been turned into a legal one; the wife shall have dower; because that is to be taken as having been done which ought to have been done; although, if the legal estate had been vested in trustees, it would have been otherwise. This case was decided ac-

The circumstances of this case were, *Taylor* agreed to convey to *Anderson* his houses in *Newcastle*, on the 1st *March*, 1750, for the consideration of 1,000*l.* to be paid at respective times; the first payment was to be on the 1st *April*, 1751. *Anderson* died after the time *Taylor* was to convey, and his wife in prospect of this dower in the houses, parted with her thirds in other lands that *Anderson* sold. After *Anderson's* death, (who was insolvent,) the question was, as *Taylor* had not conveyed, whether the wife of *Anderson*, one of the defendants, was dowable of this equitable interest.

Contra. Attorney-General and Power. They relied on the case of *Lit. tlepage v. Fauntleroy*, determined this Court, where it was decreed that the wife was not dowable of an equitable estate. But in that case, there was no positive agreement to convey, and if there had been a conveyance, it was uncertain of what estate, whether of an estate of inheritance; and the Court seemed to think (the woman who claimed dower) her husband had an estate only by the curtesy, and the wife could have no dower out of the life-estate, any more than a man can be tenant by the curtesy of a dower. The difference then is obvious between the two cases.

Power cited *Finch*, 368. but for what purpose, *quare. Attorney-General* relied on the hardship. *Answer.* It was *Taylor's* own fault in not taking security of *Anderson*. *Objection.* This is a trust created by husband which bars dower. 2 *W.* 708. *Answer.* Out of this trust it appeared husband intended dower. And that case is where the legal estate is conveyed to trustees before marriage on purpose to bar dower; but this right accrued after marriage. *Objection.* Widow ought to pay her proportion of the debt out of her thirds. *Answer.* Only in case of mortgages which are specific liens, and those only that are made before marriage.

Decreed. Houses to be sold, and the widow to have half of a third of the purchase-money, as it was of houses, which were more perishable than lands; had they been lands, she could have had only one-third of a third of the purchase-money. *Unanimous*, except *P. Randolph*.

Pendleton, in favour of the dower, cited 3 *W.* 232. and that the dowress was (in relinquishing her dower to the lands *Anderson* sold) a purchaser. 1 *Vern.* 204.

Attorney-General pressed hard that a creditor's security should not be taken from; but we thought that *Taylor* was not entitled to equity because he had not done equity, viz. conveyed as he ought to have done.

cording to the *usages* of our country. This settled the law in *Virginia*, and was not carried, by appeal, to the King in Council. Such have been the laws and usages of *Virginia* ever since. To the laws of *Virginia* we must refer, and not to the subtilty to be drawn from the *English* books.

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But it is asked, what if *Black* had brought an action for damages for a breach of contract in not conveying the lot; would his wife have been entitled to dower in those damages? It is answered, that we are not to go into supposed cases. The fact is, that *Black* was always pressing for a title. If a right vested in equity, the wife is entitled to dower, and the husband cannot deprive her of it without her own consent, by a privy examination.

It is also objected, that those under whom the defendants claim had no notice of the marriage of *Black*. To the honour of the country it may be said that every man who has arrived at the age of maturity, may be presumed to be married. From the practice of the citizens of this Commonwealth to marry at an early age, there was ground of inquiry. Purchasers in this country, invariably do inquire, whether the vendor is a married man or not. If, in this instance, it was omitted, it was *crassa negligentia*; and then, according to a well established rule of equity, the defendants cannot avail themselves of the want of notice. This is a sufficient answer to all the long train of authorities adduced by the counsel on the other side respecting notice.

The purchase money paid as a consideration for the lot, having been enjoyed by the family of Mr. *Black*, is made another objection to the demand of his widow for dower. If Mrs. *Black* has to refund, it must be by making the executors and devisees of *Black* parties. Why have not the defendants proceeded in that way?

As to the dormancy of this claim; it may be remarked that a widow cannot immediately know, after the death of her husband, the situation of his affairs.

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With respect to the last point, how far the complainant is entitled to dower out of the improvements? I will not undertake to say what may be the opinion of the Court in relation to improvements made *before* notice of the claim; but the case of *Bowyer v. Lewis*, in this Court, (MS.) has settled the law, that as to improvements made *after* notice, no deduction is to be made.

Warden, on the same side, argued that, although there was no direct proof of the existence of a deed from *Allen M^r Rae*, to *Black*, yet, under the circumstances of this case, it ought to be presumed; and that it had been lost or destroyed. *Black* was in possession from 1760 to 1766, when the lot was sold by his agents; and in 1773 he executed a deed to *Kirkpatrick*, by which his right, as derived from *M^r Rae*, was recognised. In 1764, *Kirkpatrick* himself was a tenant under *Black*, who intermarried with the present complainant in 1762, and in 1782 died. During the latter year, his widow renounced the provision made her by the will of her late husband; and in the year 1783, married the complainant *Claiborne*. *Ramsay* relinquished the purchase of the lot in 1785, because he could not obtain a deed from the heirs and executors of *Kirkpatrick* jointly: and in 1795, *Kennedy* and *Wilson*, the subsequent purchasers, not only had *presumptive* notice, arising from the pendency of this suit, but *actual* notice of the claim of dower; as may be fairly inferred from the circumstance, that *Wilson* received a deed from the heir of *M^r Rae*, which recites the purchase of *Black* from *Allen M^r Rae*, his sale to *Kirkpatrick*, and the receipt of the purchase-money by *M^r Rae*. The marriage of *Black* with the present complainant *Frances* might have been known from common fame; or at least, it was the duty of the purchasers to make inquiry as to that fact. The purchase and subsequent improvements were therefore made in their own wrong.

Every reason of the law, which gives a wife dower of a *legal* seisin, in her late husband, because she cannot compel a seisin in *deed*, applies, with equal force, to this case. Here

Black had a seisin in deed, and a right to a legal title ; but his wife could not *compel* him to accept a conveyance. A bare right to possess, is a seisin in law, (a) which will not entitle the husband to curtesy ; but where there is an actual possession, and a right to a legal title, the wife ought to have dower, for the same reason that she is entitled, from a possession in law only. (b)

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(a) 2 *Black.*
Com. 137.

(b) *Co. Lit.*
31. a.

All the authorities cited on the other side to prove that a deed is necessary to transfer a legal estate, may be answered with this remark, that they do not affect the present question, which is, whether, in a Court of *Equity*, a widow can recover dower of an *equitable* estate.

No case has been cited which comes up to the present. Some hasty precedents, indeed, have denied the widow dower out of a *trust* estate ; (c) but in all those cases the husband, had put the estate out of him before marriage, and vested it in trustees, for the express purpose of depriving the wife of dower.

(c) 2 *Black.*
Com. 337.

That the widow of a disseisor is entitled to dower is proved by many authorities ; (d) and shews that it is *possession* claiming property, and not a *conveyance* of title, which is essential to this right.

(d) 1 *Roll.*
Abr. 677. 9
Fin. 232. 3
Com. Dig.
573.

The pendency of the suit, though in a Court of *Equity*, was notice to all the world, and bound all subsequent purchasers. (e)

(e) 1 *Cha. Ca.*
151. 15 *Fin.*
127. 1 *Cha.*
Ca. 304.

It is no argument against the claim of dower, to say that the money for which the lot was sold, was enjoyed in the family of *Black*, and increased the personal fund out of which the complainant might be endowed ; because there is no case of a sale during coverture, where this does not happen ; and yet it was never before set up as a bar to dower.

The position that a widow cannot be endowed against a purchaser who has united the legal with the equitable estates, without notice of the marriage, or against the vendee of such purchaser, though he had notice, is not supported by the authorities cited. But supposing the doc-

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trine to be correctly laid down, still it has no application to the present case, where the purchases were made *pendente lite*.

As to the objection, that the widows of speculators, who buy land to sell again, and never take a title to themselves, and of the holders of land-warrants, will be entitled to dower if the doctrine for which we contend be correct, it has no weight. If the husband has had actual seisin, as in our case of an *equitable* estate of inheritance, neither law nor reason will deprive the wife of dower. But of land-warrants, or *waste* land, the husband cannot be said to be *seised*. They are perhaps considered as mere chattels; and no person can be *seised* of the land which they represent, till they are carried into a grant.

Saturday, March 18th, 1809. The Judges pronounced their opinions.

JUDGE TUCKER. *William Black*, sometime about the year 1760, purchased of *Allen M'Rae*, a lot with some buildings thereon, in *Alexandria*; the consideration paid by *Black* does not appear; but that it was a purchase, for a valuable consideration, seems not to have been questioned. In February, 1762, *Black* intermarried with the complainant, *Mrs. Claiborne*: at this time he appears to have been in actual possession of the lot, which was in the occupation of *Thomas Kirkpatrick* who paid him rent for it, and in 1766 became the purchaser of it, from *Black*, who executed a conveyance for it to him on the 5th of May, 1773, in which he states (as I think) the purchase of the lot from *M'Rae*, and adds a covenant that himself was then *seised* of a good and indefeasible estate in fee-simple, therein. This deed was acknowledged by *Black* and recorded in the General Court; and it was contended, at the bar, there was no evidence that *Kirkpatrick* ever received it, or agreed to it; but as he afterwards paid *Black* for the lot, (after some delay,) there appears to be no ground for this objection. *Kirkpatrick* dying, devised this lot to *Henderson* and others in

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trust to divide it between his sisters ; *Henderson* in his answer denies that he accepted the trust : some of them sold the lot to *Dennis Ramsay*, who states in his answer that finding some defect in the title, he gave it up to the executors (the trustees) again. After this (I presume) *Kennedy* bought the lot at public sale, in *September, 1795*. *Wilson* bought it of him. The buildings have been greatly improved ; a part of the old being pulled down. *Black* died in *January, 1802*. In 1786, *John M^rRae*, as heir at law of *Allen M^rRae*, from whom *Black* purchased, but never had any conveyance, as far as appears, conveyed the lot to *Fitzpatrick's* executors and trustees, (among whom *Henderson* is named.) *Gibson*, one of the trustees, in his answer says that he as surviving trustee and executor of *Thomas Kirkpatrick*, relinquished his powers and duties to *William Wilson*, by whom (it would seem) the lot was delivered up to public sale and bought by *Kennedy*.

1st. The first and principal question made in this cause is whether *Mrs. Claiborne*, the widow of *Black*, is, under all these circumstances, entitled to her dower in this lot, of which there is no proof that *William Black*, her husband, ever obtained any conveyance from *Allen M^rRae* of whom he purchased the same, although the fact that *Black* had peaceable possession thereof, and received the rents of *Fitzpatrick* by the hands of *Allen M^rRae*, (who in that respect appears to have acted as his agent) for many years, during his marriage, seems pretty clear.

The counsel for the defendants below, contend that *Miam Black* never had any legal estate in the lot, but merely an equitable one, of which his widow cannot be endowed. I shall inquire into the correctness of this position, as it respects the nature and quality of *William Black's* estate. That *William Black* purchased the lot in question of *Allen M^rRae*, for a valuable consideration is not disputed ; that he paid *M^rRae* for it is not disputed ; that he entered into the possession of the lot with *M^rRae's* consent is not disputed ; that he received the rents for several years, is, I think, proved ; that he was absolutely entitled to a conveyance in

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fee-simple is not disputed : that he ever received any conveyance for it is *denied*, and is certainly doubtful ; perhaps the presumption is *against* it. That his possession, perception of the rents, and sale of the lot to *Kirkpatrick*, all happened during the time he was married, is satisfactorily proved to my mind. That he executed, and *Kirkpatrick* accepted, the deed which was acknowledged in the General Court for the lot, I do not doubt. All these facts will deserve consideration, in an inquiry into the nature and quality of his estate in the lot during his marriage with the complainant.

By the common law, lands and tenements might pass by

(a) *Co. Litt.*
9. a. 121. b.

Litt. s. 59, 60.
183. *Gilb. L.*
Uses, 87.

(b) *Co. Litt.*
ubi *supra*.

Sheppard's
Touchstone,
480. 484. (5th
ed.)

(c) *Ibid.* 218.

(d) *Litt.* s.
59, 60. *Shep.*
T. 128.

(e) *Shep. T.*
480. 482. 484.

(f) *Shep. T.*
477. 493.

alienation, either *with* or *without* deed.(a)

And such alienation *without deed*, or even WRITING, might be made by feoffment with livery of seisin ; (b) or by bargain and sale ; (c) or by lease, for life, for years, or at will ; or to one for life or years, with remainder over in fee-simple, fee-tail, or for life.(d) And such alienations by

PAROL only, might also be made to *uses* ; as to *A.* to the use of *B.* in fee-simple, fee-tail, or otherwise.(e) And such uses might either be *express*, as when declared either *before*, *at*, or *after* the time of making the estate ; (f) or *implied* in law, where no such declaration as before mentioned, was made : for where a man made a feoffment in fee *without any consideration*, the law construed the feoffment to be made to his *own* use, merely ; but if there were a *valuable consideration paid*, and no use expressed, the law said it should be to the use of the *bargainee*, or *feoffee*, and his heirs.(g) And if a man by verbal agreement, in consideration of money, or the like, sold his land to another, or agreed and promised that the bargainee should have it for any time, a *good use* did *arise at common law* ; and it was moreover held that a bargainee of land, for a *valuable consideration*, could not be seised of land to *any other* use but

(g) *Shep. T.*
477, 478.

his own.(h) These alienations by PAROL though in great measure fallen into *disuse* were not *invalidated* in *England* until the statute of frauds and perjuries, 29 *Car. II. c. 3.* (which never was in force in *Virginia*.) was made ; which

(h) *Shep. T.*
484. 8 *Co.* 94.
2 *Inst.* 675.
Dyer, 229. 12
Mod. 162,
163. *Gilb. L.*
Uses, 271. 2
Fond. 33. 21.
no.

provides against conveying lands, or hereditaments for more than three years, or declaring any trust of them, otherwise than by writing; and likewise invalidates all *parol* contracts for the sale of lands. (a) And if a man in consideration of so much money to be paid at a day to come, bargained and sold lands, the use passed presently; and after the day the party had an action for the money; for it is a SALE, by the money paid either presently or afterwards. (b) Before the statute 1 R. III. c. 1. the *feoffees to uses* had not only all the *estate* in the land, but also all the *power* to give and dispose of it, insomuch, that *cestui qui use*, although the estate was created and expressly declared to be for his benefit, was nevertheless held to be a trespasser, if he entered upon the land, against the feoffee's will. And though that statute enabled the *cestui qui use* to dispose of the lands, without his feoffee's consent, and declared all acts done by him in respect to such disposition to be good, not only against himself and his heirs, but also against his feoffee in trust, yet it was held that all the power over the land still remained in the *feoffee* in trust, until the *cestui qui trust* had made such a disposition of it as the statute authorised. A consequence was, that the feoffees in truth, many times contrary to the trust reposed in them, by secret conveyances, defrauded the *cestui qui use*, and prevented his disposing of the land as authorised by the statute; and sometimes there was fraud in both; for when *cestui qui use* by himself without the feoffees, by force of the statute and the feoffees by themselves without *cestui qui use*, by the common law had both, severally, *absolute power* to make a disposition of the same land, sometimes *cestui qui use*, by his secret estates, prevented the feoffees, and sometimes the feoffees, by the like secret estates, prevented the *cestui qui use*, so that they played at double hand, and thereby beguiled the true intent of the statute. (c) To prevent this mischief, among others, the statute of uses, 27 Hen. VIII. c. 10. was made, whereby it was declared "that where any person or persons *stand or be seised*, or at any time thereafter shall happen to be seised of and in any lands, tenements, rents, services, reversions, remainders,

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(a) Har. Co.
Litt. p. 48.
note 1. and 3.
Shep. T. 204.
493.

(b) Dyer,
337. a.

(c) 1 Co. 132.

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“ or other hereditaments, to the *USE*, confidence, or *TRUST*
 “ of any other person or persons, or of any body politic by
 “ reason of any *bargain, sale, feoffment, fine, recovery,*
 “ *covenant, contract, agreement, will, or otherwise by any*
 “ *means whatsoever*: that in every such case, all and every
 “ such person and persons, and bodies politic, that have or
 “ hereafter shall have any such *use*, confidence, or
 “ trust, in fee-simple, fee-tail, or for term of life, or for
 “ years, or otherwise; or any *use*, confidence, or *trust* in
 “ remainder, or reversion, shall from thenceforth stand and
 “ be *SEISED*, deemed and *adjudged* in *lawful seisin*, estate
 “ and possession of and in the same lands, &c. with their
 “ appurtenances, to all *intents*, constructions, and *purposes*
 “ *in the law*, of and in such like estates, as they had, or
 “ shall have in use, trust, or confidence of or in the same.
 “ And that the *estate, title, right, and possession* that were in
 “ such person or persons that were or hereafter shall be
 “ seised of any lands, tenements, or hereditaments, to the
 “ *use*, confidence, or *trust* of any such person or persons,
 “ or of any body politic, be from henceforth clearly deem-
 “ ed and adjudged to *be in him* or them that have, or here-
 “ after shall have such *use*, confidence or *trust*, after such
 “ quality, manner, form and condition, as they had before in
 “ or to the *use*, confidence, or trust, that was in them.” We
 are told, 1 *Co. Rep.* 132. that this statute (27 *Hen. VIII.* c.
 10.) was not made to extinguish or eradicate uses, but that
 it had advanced them by making the *cestui qui use* the ab-
 solute owner of the land instead of the feoffee in trust;
 that before the statute, the office of the feoffee was to exe-
 cute the estate according to the use, but that the statute
 hath taken away that office, and executes the possession to
 the use, and takes away *all the trust and power out of the*
feoffees; so that since the statute there is neither *trust* nor
confidence reposed in the feoffees; of whom it was said
non possunt agere, aut permittere aliquid, in prejudice of
 the *cestui qui use*. To this I will add that as far as I am
 able to discover, this statute availed not, either to extin-
 guish, or invalidate *conveyances* at common law, any more

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than *uses* ; for to me it appears, that it matters not whether a *use* was created by deed or *without* deed, or by feoffment by *parol*, with livery of seisin, or by *bargain, sale, contract, or agreement* in writing, or by *parol* ; or if such use were *created* or brought into existence in *any other manner whatsoever, or by any means whatsoever*, NO MATTER WHAT, the statute instantly transferred the estate, right, title, and possession of the feoffee to *uses*, or of the person making any such *bargain, sale, contract, or agreement*, to the persons for whose *benefit*, whether *expressed, or implied in law*, such *feoffment, bargain, sale, contract, or agreement* was made or intended by the parties, according to such intention, or to that of the law, in those cases where no consideration whatever was paid, or where a *valuable consideration* was paid by the purchasers, or vendee of the land, provided the feoffee to uses, at the time of making the feoffment, or the feoffee to uses at any time after ; or the *bargainor, seller, or vendor* of the land, at the time of the *bargain, sale, contract, or agreement*, or at any time after, during the continuance of the term or estate meant, intended, or agreed to be created, had in himself a SEISIN of the lands, intended to be conveyed, bargained, sold, or transferred. So that the *cestui qui use, or purchaser* for a *valuable consideration*, gained not a possession in *law* only, but a *seisin in fee*, not a *title to enter into the land*, but an actual LEGAL estate.(a)

(a) *Bac. Law Tracts, 338.*

It is true that Lord *Bacon*, in his reading on'this statute, seems to reject the words *agreement, will*, or otherwise, in the purview of the act, as having no operation ; or at least not such as I have supposed above. And his reason seems founded upon the use of the word *will* in the statute ; whereas, as he remarks, lands were not at that time, nor until seven years after, (32 H. VIII. c. 1.) devisable. But great stress is laid in the preamble upon cases created by *parol wills* of lands, before that time ; and though lands were not *generally* devisable at that time, yet they were certainly devisable by custom, in many parts of *En-*

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(a) *Lit. s. 167.*
Co. Lit. 111.

gland.(a) And since the Legislature by the preamble of the statute, appear to have been informed of the evil of secret uses so created, and to have intended to remedy it, wherever it might occur, I see no reason for rejecting the word *will*, any more than any other operative word in the statute. A further reason why the word *will*, in the statute is not to be rejected as having no operation, arises from the purview of the 11th sect. of the statute, which declares "all true and just wills before made, or which "should be made by any person, who should die before "the first day of *May*, following, of lands, &c. shall be "good and effectual in law after such fashion, manner and "form, as they were commonly taken and used at any time "within forty years before." Now this clearly proves that the Parliament did intend to provide for cases where uses might have been created by will: and that being the case, there is no reason for rejecting the words "*agreement*," "or otherwise," with which it is connected. *See also Butler's note on Co. Lit. p. 277. a. & b.* I should certainly distrust my own judgment in differing from so great an authority, had I not Lord *Coke* on my side, who says expressly, that in some Cities and Boroughs, lands may pass as chattels, by *will nuncupative*, or *parol*, *without writing*: to which his commentator, Mr. *Hargrave*, subjoins the following note, "But now by the 29th of *Car. II. c. 3.* a will "of lands devisable by custom is not good, unless it be in "writing, signed and attested in the same manner as a will "of lands devisable by statute." *Co. Lit. 111. Ib. n. 3.* The same commentator adds, "through the medium of "uses, the power of *devising* was continually exercised "with *effect* and *reality*. But at length this practice "was checked, not *accidentally*, but *designedly*, by the "27 *H. VIII.* which, by transferring the *possession*, or "legal estate, to the use, *necessarily* and *compulsively* "consolidated them into one, and so had the effect of "wholly destroying all distinctions between them, till "means to evade the statute were invented." *Ib. 111. b. n. 1.* The same learned commentator likewise says else-

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where. "Before the statute of uses, *equitable* estates of
"freehold, might, be created through the medium of trusts,
"without livery, and by operation of that statute, *legal*
"estates of freehold may now be created the same way.
"Those who framed the statute of uses, evidently foresaw
"that it would render livery unnecessary to the passing of
"a freehold, and that a freehold of such things as do not
"lie in grant, *would become transferable by PAROL only,*
"*without any solemnity whatever.* To prevent the incon-
"veniences which might arise from a mode of conveyance
"so uncertain in the proof, and so liable to misconstruction
"and abuse, it was enacted in the *same* session of Parlia-
"ment, that an estate of freehold should not pass by bar-
"gain and sale *only,* unless it was by indenture *enrolled.*"
See stat. 27 H. VIII. c. 16. *Harg. Co. Lit.* 48. a. n. 3.
To this I shall add the opinion of Ch. J. *Holt*, and the
whole Court, in 12 *Mod.* 162, 163. who says, "if a bargain
"and sale were made of a man's lands on the payment of
"money, the use would have raised, *without deed,* by *parol.*
"So, where there was a *transmutation of possession,* there
"NEEDED NO DEED, but only the bare appointment of the
"party." And again. "If a man for money aliened and grant-
"ed his land to one and his heirs, by this a use was raised by
"construction, and it amounted to a bargain and sale; and
"so it is in *Fox's* case, 8 *Co.* 94. a." On the case here
mentioned by Lord *Holt*, I shall just remark, that it was de-
cided in 7 *Jac.* I. three years after the epoch to which our
law refers, as to the obligation of *British* statutes in this
Commonwealth; and that the question upon which it was
decided arose in 31 *Eliz.* a few years only before.

To these authorities I shall add that of Lord *Coke*, in 2
Inst. 675. who says "it was resolved by the opinion of the
"Justices of *both* Benches, that a bargain and sale for a
"valuable consideration of houses or lands in *London,* &c.
"by WORD ONLY, is sufficient to PASS the same; for that
"houses and lands in any City, &c. are exempted out of the
"act of 27 H. VIII. c. 16. concerning enrolments of deeds:
"and at *common law,* such a bargain and sale by WORD

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"ONLY, raised a use. And the statute 27 H. VIII. c. 10. doth transfer the use into possession;" for which he cites *Dyer*, 229. *Chilbern's case*, 6 *Eliz.*

Having had occasion to mention the statute of enrolments, 27 H. VIII. c. 16. whereby it was declared, "that no manors, lands, tenements, or hereditaments, (except in Cities, Boroughs, or towns corporate, wherein the mayors or other officers have authority to enrol deeds,) shall pass or change from one to another by reason *only* of any bargain and sale thereof to be made, whereby any estate of inheritance or freehold shall be made, or take effect in any person or persons, or any use thereof to be made, except the same bargain and sale be made by writing indented, sealed and enrolled in one of the *King's Courts of Record at Westminster*, or else within the County or Counties where the same lie, or be, before the *Custos Rotarum*, and two Justices of the Peace," &c.

I shall now observe, that this statute never was in force in this country; 1st. Because the provision of it, as to enrolling deeds in the *King's Courts at Westminster*, was either wholly impracticable, or highly inconvenient; 2dly. That in this country there never was any such an officer as the *Custos Rotulorum* mentioned in the statute; 3dly. That the exception in respect to Cities, Boroughs and corporate towns, proves that even in *England* it was not a universal law of the realm: consequently, was not brought over hither by our ancestors. Whereas the statute of uses, was a universal law of the realm, made in aid of the common law, and, as such, was not only brought over by our ancestors, but was recognised by our Convention at the period of the revolution: consequently, whatever construction upon the statute, and the common law as altered thereby, was proper in *England*, in cases not within the statute of enrolments, or might now be made there, if the statute of frauds and perjuries, 29 *Car. II.* c. 3. and other supplementary statutes had not been made there, may now be made in this country, except so

far as the law has been altered by our own Legislature, either before or since the revolution.

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The point which I conceive to be proved by the authorities before cited, and the reasons in support of them, is, that a bargain and sale of lands in *Virginia*, for a *valuable consideration* by *word only*, is (unless there be some act of the General Assembly to the contrary) sufficient to *PASS* the same ; for that at *common law*, such a bargain and sale, by *word only*, raised a use, and the statute of 27 H. VIII. c. 10. transferred the use into possession : not a possession in *law only*, but (in the words of Lord Bacon) a *seisin in fee* ; not a *title to enter* into the land, but an *actual estate*. *Bac. Law Tracts*, 338.

A bargain and sale of lands may be defined a *real contract on a valuable consideration*, for *passing* or transferring them *from one to another*. (a) And when made by *word only*, it is no way distinguishable, that I can discover, from a *contract*, or *agreement*, to the same purpose. The effect, where founded upon a *valuable consideration*, being the same under the statute, which executes *bargains, sales, contracts*, and *agreements*, in the same manner as it executes a feoffment, fine, recovery, or covenant : the former *estate*, right, title, and possession of the vendor, being instantly vested in the vendee, who by virtue of the statute has the *lawful seisin, estate*, and *possession* thereby vested in him to all intents, *constructions*, and *purposes* in the law. If then the last words of the statute be not perfectly nugatory, the moment that a bargain and sale for a valuable consideration was concluded between the parties the estate of the vendor was annihilated, and that of the vendee absolute to all intents and purposes in law.

(a) *Shep. Touch.* 218.
Butler's note
in *Co. Lit.*
275. a.

Let us inquire then, if by any act of the Legislature of *Virginia*, antecedent to our act to prevent frauds and perjuries, passed in the year 1785, the statute of uses hath been in this respect repealed.

The first act upon the subject, which I have been able to find, is that of 1710, c. 13. (edition of 1733,) whereby it is enacted, " that no lands, tenements, or other heredita-

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"ments shall pass, alter, or change from one to another
"whereby an estate of inheritance in fee-simple, fee-tail,
"general or special, or any estate for life or lives, or any
"greater or higher estate shall be made or take effect in
"any person or persons, or any use thereof to be made by
"bargain and sale, *lease and release, deed of settlement to*
"*uses of feoffment, or other instrument*, unless the same be
"made by writing indented, sealed and recorded in the
"records of the General Court, or of that County where
"the lands shall lie," &c.

This act is a transcript from the statute of enrolments, 27 H. VIII. c. 16. but extends its provisions still further, by requiring that not only deeds of *bargain and sale*, (the only conveyance mentioned in the statute,) but that deeds of lease and release, which were invented and brought into use to evade it, and deeds of settlement to *uses of feoffment*, or other *instruments*, should be executed, acknowledged, or proved, and recorded in the same manner. But in the year 1734, c. 6. the Legislature found it necessary to amend the act, after reciting so much of it as I have transcribed above, they say that it "was intended as a security
"to purchasers and creditors, but by the *strict* wording of
"it, had been construed to destroy all deeds-poll, though
"they be recorded, and to make void all conveyances not
"recorded, even between the parties, *though in respect to*
"*them*, recording be unnecessary; yet ways had been
"found out, and of late much practised, by making mortgages, marriage settlements, and deeds in trust, for long
"term of years, (which are not provided against,) to defraud both creditors and purchasers, and so to elude the
"ONLY DESIGN of the act." It then declares all conveyances theretofore *bona fide* made by deed-poll or otherwise, valid and binding between the parties and their heirs, though not before acknowledged, or proved and recorded, and then proceeds thus; "AND FOR A GREATER SECURITY
"TO CREDITORS AND PURCHASERS, Be it enacted by the
"authority aforesaid, that all *bargains, sales* and other conveyances whatsoever of lands, tenements, and heredita-

“ments, whether they be made for passing any estate of
“freehold or inheritance, or for term of years, and all
“deeds of settlement upon marriage, wherein either lands,
“slaves, money, or personal thing, shall be settled or cove-
“nanted to be left or paid at the death of the party, or
“otherwise, and all deeds of trust whatsoever shall be
“void, as to all *creditors*, and *subsequent purchasers*, un-
“less they be acknowledged, or proved and recorded, ac-
“cording to the directions of the said act: but the same,
“as between the parties, shall, notwithstanding, BE VALID
“AND BINDING.”

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It seems to me very material to remark, that there is *no such proviso* in the statute of enrolments: from which, as I have before observed, our act of 1710 is literally a transcript, with the addition of some other words, which do not vary the sense of the statute, but extend it only to other conveyances besides deeds of bargain and sale, nor is there any such provision in the statute of frauds and perjuries. Under the former, a deed of bargain and sale not enrolled according to the statute, is VOID between the PARTIES, as well as *others*. Under the latter, a parol release, or livery of seisin by parol only, has the effect of conveying only an *estate at will*, except leases for a term not exceeding three years, &c.

Whatever doubt might have been entertained upon the *strict wording* of the first act, whether it had not invalidated all bargains, sales, contracts, and agreements concerning lands, though made for a valuable consideration, and *bona fide*, unless perfected and consummated by deed indented, sealed, acknowledged, or proved and recorded, pursuant to the act, this interpretation which the Legislature has given us of its own will, intent and meaning, is sufficient to convince my mind that it was neither its intention to repeal the statute of uses, as to the effect of any bargain, sale, covenant, contract, or agreement *between the parties*, nor to require any other solemnity in the transfer of lands from one to another, as far as regarded the right, title, interest, estate, possession and seisin of the

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lands as between the *parties* THEMSELVES; than was requisite or necessary before the passing of the act. For it could never be the intention of the act to let loose men from their contracts made for a *valuable consideration*, nor to drive them into a Court of Chancery to have them carried into execution and effect, (the very thing which the statute of uses meant to prevent,) when that statute did of itself execute, and carry into *absolute effect*, every *such* contract, by transferring the *use* created or implied by the terms of the contract, into a *legal estate*, *possession* and *seisin*. And though as against creditors and after-purchasers the estate so created and transferred, may be defeasible, or void, for want of a *deed recorded*, yet as between the parties it is valid, *ab initio* : for a thing may be void for one purpose, (a) *Hob.* 165. and not to another ;(a) and until it is made to appear that a creditor or purchaser is affected, the estate as created by the act of the parties, and the operation of the law upon that act, is a *legal estate*, and *valid to all intents and purposes between them*. And to this effect is *Hob.* 166. as to fraudulent conveyances made by jointresses, or tenants in dower, upon the stat. 11 *H.* VII. which he tells us were good against the party, though void as to some others.

Perhaps it may be supposed that the words "*bargains, sales, and other conveyances*," which are declared to be valid and binding between the parties, though void as to creditors and subsequent purchasers, extend only to *conveyances in writing*. To my apprehension, the word "*bargains*," as well as the word "*sales*," which are used as separate and distinct descriptive terms in this amendatory act, cannot be interpreted to designate that particular species of written conveyances, called a *deed of bargain and sale*. They are used in a more *general* and comprehensive sense, and signify a real contract for a valuable consideration, for passing and transferring lands from one to another ;(b) and *as between the parties themselves*, there was every reason for carrying them into complete effect as before, by virtue of the statute of uses : more especially where there was an actual transmutation of possession;

(a) *Shep.*
Touch. 213.
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though no deed or writing was ever made between the parties.

Again, if the exception in the statute of enrolments (from which our act of 1710, c. 13. is a literal transcript, with the addition only of some other kinds of conveyances, besides a deed of bargain and sale as before remarked) as to Cities and Boroughs, left the conveyances at common law, and the operation of the statute of uses, upon uses at common law, in full force and effect in *London*, &c. as was adjudged in *Chilbern's* case, *Dyer*, 229. so that a bargain and sale, by word only, made of lands or houses in *London* for a valuable consideration, would be sufficient to *pass* the same; I ask, whether the exception in the act of 1734, as to the operation of the act of 1710, whereby all bargains and sales, and other conveyances whatsoever, are declared to be valid and binding between the *parties*, is not as strong as the other? For where is the difference whether the exception be as to the acts of *certain persons*, or to acts done in *certain places*? Considering then the act of 1734, c. 6. as containing an exception from the general provisions of the act of 1710, c. 13. whereby all bargains, sales, and other conveyances whatsoever, were, as between the parties themselves, left upon the same footing as before the making of the former of those acts, I consider a parol bargain and sale of lands in *Virginia*, for a valuable consideration, as between the *parties themselves*, as standing precisely upon the same ground under those acts, as a parol bargain and sale of lands or houses in *London* before the statute of frauds and perjuries, 29 *Car.* II. c. 3. which required all conveyances and contracts for the sale of lands, to be made in writing. These two acts were consolidated in the year 1748, c. 1. with this additional circumstance, that the last mentioned act declares all bargains, sales, and other conveyances whatsoever, valid and binding, not only between the parties themselves, but THEIR HEIRS. And as it was during the period that this last act was in force that *Black* purchased, and *M'Rae* sold the lot in question

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(a) See 12
Mod. 162. be-
fore referred
to, p. 337.

for a valuable consideration, which purchase and sale was moreover attended with an actual *transmutation of possession*(a) from the seller to the buyer, I am of opinion that whether *M^rRae* did or did not execute a conveyance for the lot to *Black*, the latter acquired a **LEGAL estate**, *seisin* and *possession* of the lot in question under the statute of uses ; valid and binding against *M^rRae* and his heirs, under the provisions contained in the act of 1748, c. 1. and defeasible **ONLY** by the *creditors* of *M^rRae* or *bona fide purchasers* from him.

(b) 2 P.
Wms. 646.

In the last argument of this cause, it was objected by the counsel for the defendant, that a woman was not dowable of a use at common law. *Perk.* s. 349. The same author says, s. 457. that there shall be no tenant by curtesy of a use ; yet the Court of Chancery in *England* has decided otherwise as to that point. Sir *Jos. Jekyll*(b) supposes it probable that the other books, where the same thing is said may be taken from the same authority : and that this might possibly be said with regard only to a demand of dower at *law*, and not in a Court of Equity. And as to the preamble to the statute of uses, he further observes, that there is room to think that the words, “ that by uses men lost their tenancies by the curtesy, and women their dower,” ought not to be taken in a general sense, for the uses complained of were such as were created by fraudulent assurances, and were secret ; but supposing all uses, before the statute, were thought to bar tenants by the curtesy and dower, even in equity, as well as law, yet it will not follow at this time of day, (*and in this country*,) that trusts or equitable interests are now to be considered here as they were *then* in *England*. For the statute of uses having converted the use created by the bargain and sale for a valuable consideration, into a *legal* estate, and *seisin*, in the bargainee ; and the statute of enrolments requiring that the bargain and sale should be in writing, never having been in force in *Virginia*, the bargainee became instantly *seised* of a *legal* estate, of which his wife might have been endowed, without any necessity for a deed, as I have before

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shewn, and not merely of a use, or equitable estate ; and although my construction of our acts of 1710, 1734, and 1748, in supposing that as between the parties themselves, and their heirs, no deed or written conveyance whatsoever, was necessary to pass lands, should be erroneous, still I think it undeniable, that *before* the passing of these acts of Assembly the estate of the purchaser for a valuable consideration actually paid, accompanied with actual possession of the lands, was *complete* in law ; and thereafter the wife of the purchaser would have been *legally* entitled to dower in the lands ; which differs the case essentially from that of a *use*, before the statute of uses. If then the operation of our acts of Assembly be this ; that what would have constituted a complete *legal* title and estate in lands, *before* the passage thereof, be now turned into a mere equitable title ; will equity refuse to the wife, that which she before was *legally* entitled to demand ; and if she possessed power over the actions of her husband, might, by the aid of a Court of Equity, have reduced to a *legal* title, according to the requisitions of the statute during her coverture ; but having no such power, is obliged to postpone the demand of her right, until the determination of her coverture ? Change the parties, and equity will act as handmaid to the claim of the husband to his curtesy, though he might, during the life of the wife, have enforced the execution of a legal title. And will she refuse her aid to the weaker sex, where the right is the same, and the reason stronger ?

It was also contended, at the bar, that *Black* never was *seised* of the lot. But what is a *seisin* ? I mean a *seisin* in deed, or in *fact* ? Does it mean either more or less than the actual possession of an estate of freehold, or inheritance ? Whether acquired by *livery of seisin*, or by a man's own *entry* at common law ; or by the *seisin* or actual *entry* of his feoffee, or trustee to uses, under the statute of uses. We are told by an ancient author, that an hour's *actual possession* quietly taken, confers a *seisin de droit*, and *de claime*, whereof no man can disseise him that hath taken such possession, but that the party claiming in opposition

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(a) *Perkins*,
457, 458.
(b) 2 *Bro.*
Ch. 271.

thereto must be driven to his action.(a) The word *seisin*, according to the opinion of Lord *Thurlow*, will extend to being seised of an estate in equity.(b) And Lord Ch. Baron *Gilbert*, in *Coventry v. Coventry*, at the end of *Francis's* maxims, expressly says, "in all cases where an agreement " is entered into in contemplation of a *valuable* consideration, " when *that* is *performed*, it is but justice and conscience that " the purchaser should have an immediate right and owner- " ship in what he hath so purchased ; and therefore a Court " of Equity, *before the execution of any legal conveyance*, " looks upon the party to be in *immediate possession* of " such estate, and to have a power of *devising* and *giving* " it *away*." Is it not in proof that *Black* received the rents of this lot from *Kirkpatrick* several years before he sold it to him? Nay more, that *M^r Rae* acted as his agent in the receipt of them for him? If so, what further evidence of an actual peaceable possession by *Black* can be required? Is there not further proof were it necessary? viz. the deed from *Black* to *Kirkpatrick*, (accepted no doubt by the latter, as he afterwards appears to have paid the money for the lot, which he at first objected to,) in which the former expressly covenants that he is seised of an indefeasible estate in fee-simple in the lot. I concur with the Chancellor in thinking that *Kirkpatrick*, by this deed, was estopped from denying that *Black* was actually *seised in fee*. Suppose *Black* had been only a tenant for years, or at will, and had made a feoffment in fee of the lot, his wife would have been entitled to dower. For by the feoffment he would have gained a fee (though but for an instant) by disseisin, and the feoffee was bound thereby.(c) For where a husband *tortiously* gains an instantaneous *seisin*, as against the person benefited by, and deriving an estate in virtue of, such tortious act, the wife is entitled to dower, and the feoffee can never plead that the husband was never seised.(d) Now *Black* was either the owner of the lot, or a disseisor, and either way the purchaser from him, with a covenant that he was seised in fee-simple takes an estate to which his wife had title of dower. For although *Black's* estate might have

(c) *Harg. Co.*
Litt. p. 32. b.
n. 3.

(d) See *Grayl.*
Bac. vol. 2.
132, (6th vol.
413. of old
edit.) *Ibid.*
100. Sir *W.*
Jones's Rep.
317. *Ma-*
thew Taylor's
case cited.

been a *defeasible* one at law, yet as he was never ousted during the coverture, his wife shall be endowed against the purchaser.^(a) But if my conclusions from the operations of the statute of uses be just, *Black* had an indefeasible estate in the lot, at the time that he sold to *Kirkpatrick*, even against *M^rRae* himself. For having attained peaceable possession in consideration of money paid, his title was perfect without any deed ; for the moment the bargain and sale for a valuable consideration was concluded, *M^rRae* became seised to *his use*, and the statute transferred the *seisin and possession* to him. And when in virtue thereof he had actually entered, there was *juris et seisinæ conjunctio*.

The case of *M^cClean* and *Copper* in this Court,^(b) may be considered as against me. But there is a wide distinction between the two cases. In that, *Arrell* entered in 1776, upon lands to which he had no other title than a title-bond to *Rigdon*, assigned to *Arrell* in February, 1775, by *Rigdon's* widow, claiming the land under a residuary devise in her husband's will ; neither of whom are found to have ever possessed the land. A bond to convey is *prima facie* evidence that *no* conveyance or title has been made either by deed or otherwise. *Arrell* never had any other than an equitable title : First, such a bond never could be considered as a conveyance, but was evidence to the contrary. Secondly, such a bond was not assignable at law. Thirdly, neither the husband or his widow are found ever to have had possession of the land, so as to make a legal conveyance to *Arrell*. Fourthly, *Arrell's* entry, though said to be made in consequence of the bond, was not at the time of the assignment, but a year after. Whereas *Black* purchased from *Allen M^rRae*, whose title and possession are not disputed, and was either put into possession by him in consideration of money paid, or else he entered with *M^rRae's* approbation and consent, as it clearly appears he afterwards received and paid over the rents for *Black* as his agent. These circumstances constitute a wide difference between the two cases. It has more than once, I believe, been decided in this Court that parol marriage agreements respect-

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(a) 2 Bac.
Ab. 127, 128.

(b) 3 Call,
370.

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ing lands, were valid even *after* the act of 1748, c. 1. against all subsequent purchasers of the lands, except such as were for a *valuable* consideration. *Thornton v. Corbin*, 3 Call, 384. is expressly so. This is a strong case in support of my construction of *other parol* agreements upon a *valuable* consideration executed by delivery of actual possession.

Another point insisted on by the counsel for the defendants was, that if Mrs. *Black* were dowerable against the heir, or against a purchaser with notice, she cannot recover against a purchaser who has united the legal and equitable estates without notice of the marriage; or against his vendee, though he had notice. But it must be recollected that all this objection goes to dower in an *equitable* estate. Now I have shewn that *Black's* estate was not merely an equitable but a *legal* estate. And this Court has expressly declared that though *equitable* rights may, in favour of fair *bona fide* purchasers for valuable considerations, and without notice, be lost by a sale, *legal rights never can*, unless there be frauds, (which is not alleged in this case,) for in cases of *legal rights* the principle of *caveat emptor* properly applies. (a) And the very page (2 *Black. Com.* 132.) referred to for the purpose of defeating the plaintiff's claim, informs us, that where dower is allowable, it matters not though the husband alienes the lands during the coverture, for he alienes them liable to dower. (b) And cases are not wanting where Courts of Equity have interposed to the prejudice of a purchaser without notice of the plaintiff's title as dowress. (c)

(a) 1 *Wash.*
217.

(b) See also
Co. Litt. 32.
a.

(c) 2 *Fonb.*
147. n. *Wil-*
liams v Lamb.
3. Bro. Ch.
364. there
cited. See also
1 *Fonb.* 22. n.
157. n.

A third objection (the 5th contended for by the counsel for the defendant) is, "that if the plaintiff had remedy, *it was at law*; and that the failure of exception to the jurisdiction of a Court of Equity cannot confer jurisdiction." *Mitford*, a writer often cited and relied on in this Court, says, that in some cases, as in matters of account, partitions of estates between tenants in common, and *assignment of dower*, a Court of Equity will entertain jurisdiction of a suit though remedy might *perhaps* be had in the Courts of Common Law. That in the case of dower the

widow is often much perplexed in proceedings upon a writ of dower at the common law, to discover the titles of her deceased husband to the estates out of which she claims her dower, &c. that Courts of Equity having gone the length of assuming jurisdiction in the cases before mentioned, seem by degrees to have been considered, as having on these subjects a concurrent *jurisdiction* with the Courts of Common Law, in cases where *no difficulty* would have attended the proceeding in these Courts.(a) The authority of this passage in *Mitford*, though not supported by any case cited in the treatise, was acknowledged by Lord Ch. J. *Loughborough*, in *Mundy v. Mundy*, 2 *Ves. jun.* 129. In this country, the practice in the County Courts has, I believe almost invariably, been to assign dower upon a bill in equity. The reason probably was, that by that means, dower was assigned, and distribution of the slaves and personal estate made, by one set of commissioners, appointed for that purpose by the Court. Here indeed no such reason occurs. But the loss of a deed from *M^cRae* to *Black* is made the foundation of one (or perhaps all) of the bills. The supplemental bill filed in *April*, 1800, alleges, that the plaintiffs had a short time before that discovered that the surviving defendants to their former amended bill, had attempted to elude their claim by procuring a conveyance from *John M^cRae*, styling himself son and heir of *Allen M^cRae*, for the lot, and that they had afterwards conveyed the same to the other defendants. This deed is admitted (or perhaps insisted on) by all the defendants in their answers.

Though probably as little disposed to favour the undue extension of the jurisdiction of Courts of Equity as any Judge that has set upon this bench, *this circumstance alone* is sufficient to induce me to decide in favour of that jurisdiction in this particular case. For, to what purpose could a conveyance from the heir of *Allen M^cRae* have been obtained by the defendants? Clearly to prove, by deducing a title from *M^cRae*, instead of *Black*, that she had no title to recover dower at law, on the presumption that *Black* never had a legal title from *M^cRae*; and thus to bar her from a

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(a) *Mitford's*
Pleadings in
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109, 110, 111.

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recovery either at law, or in equity : for if that deed could operate as an equitable bar, much more might it be set up as a legal one. It was accordingly insisted on in the argument that the defendants did not claim under *Black*, but *M'Rae*. This conduct of the defendants, whatever other ground of objection there might have been to sustaining the bill, does in my opinion invalidate every thing that can be said against the jurisdiction of the Court. And the Court being possessed of the causes, will proceed to decree relief, without turning the party round to another tribunal ; unless indeed one circumstance should make it necessary to award an issue to be tried at law to determine the fact of the complainants' marriage. See *Curtis v. Curtis*, cited 2 *Ves. jun.* 126. where it is said that the marriage being denied, *Ld. Bathurst*, Chancellor, sent the parties to law to try that.

It was, however, contended at the bar, that this was a mere *trust*, which the statute of uses could not execute. If this observation was intended to distinguish it from a *use* at common law, I conceive it has been already sufficiently answered. For before the stat. 27 *H. VIII. c. 10.* a *use*, confidence, or *trust*, were the same. And, as I have already shewn, a bargain and sale of lands for a valuable consideration, though made by *parol* only, raised a good *use* at common law. (a) Will the calling it a *trust* change the nature of it, or prevent the operation of the statute ? *Ld. Ch. J. Holt* tells us otherwise : a *use*, which at common law was a *trust* of a freehold, or inheritance, is executed, as he tells us, by the statute which mentions the word *trust*, as well as *use* ; and trusts at common law and *uses* are *equally executed* by the statute. (b) We are more-over told, that whatever was, or would have been a *trust* at common law is since the statute of uses executed. (c)

We are told that there are three ways of creating a *use* or *trust*, which the statute *cannot* execute ; 1. Where a *use* is limited upon a *use*. 2. Where a term of years is created, and limited in *trust*. 3. And lastly, where lands are limited to trustees to *pay over* the rents and profits to another. 5 *Bac. Abr.* 379. old ed. 1 *Eq. Ca. Abr.* 383. 2

(a) *Shep.* 484.
2 *Inst.* 675.

(b) 2 *Salk.*
679. 2 *Lord*
Raym. 876—
878. 1 *Eq. Ca.*
Abr. 383.

(c) 1 *Vent.* 232.
cited 2 *Salk.*
679. *in marg.*

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Fonb. 15, 16. and 2 *Black. Com.* 335, 336. where the origin, foundation, and reasonableness of these several distinctions are briefly examined. To these we may add trusts arising by operation of law, which it has been said; have been but of *two* kinds : 1st. Where the conveyance has been taken in the name of one man, and the purchase-money paid by *another* ; or, 2d. Where the owner of an estate has made a voluntary conveyance of it, and made a declaration of the trust with regard to one part of the estate; and has been silent with regard to the other part of it. These, it is said, have been the two only instances of a trust allowed, to arise by operation of law, since the statute of frauds, 29 *Car.* II. unless there had been a plain or express fraud. 5 *Bac. Abr.* 390. old ed. Mr. *Gwyllim* in his edition, suspects the fidelity of the reporter in this passage; and actually enumerates several other cases of *resulting trusts* in equity. But not one of them that bears the smallest resemblance to the present case : I shall therefore pass them over ; and it would be misspending time to shew more at large, that none of the cases enumerated above, bear the smallest analogy to it. Consequently, the position assumed by the counsel for the defendant, that this was one of those trusts which the statute of uses *could not* execute, appears to be unfounded, both from negative and positive authorities.

As to the cases in which dower has been refused out of a trust estate, neither the cases of *Lady Radnor v. Vandenberg*, *Show. Parl. Cas.* 69. nor *Colt v. Colt*, cited 2 *P. Wms.* 640. 1 *Ch. Rep.* 254. nor *Bottomly v. Fairfax*, *Prec. in Ch.* 336. nor *Brown v. Gibbes*, same book, 97. nor *Chaplin v. Chaplin*, 3 *P. Wms.* 229. nor *Attorney-General v. Scott*, *Cases temp. Talbot*, 138. nor *Godwin v. Winsmore*, 2 *Atk.* 525. nor *Dixon v. Saville*, 1 *Bro. Ch. Rep.* 326. nor *Wray v. Williams*, *Prec. in Ch.* 151. more fully stated in 1 *P. Wms.* 137. nor *Swannock v. Lyford*, *Amb. Rep.* 6. nor any other case in which the widow has been refused dower in equity, that I have been able to meet with, bear any analogy to the

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(a) *John Randolph's MS. Rep.* 77.

(b) *April General Court, 1755, MSS of John Randolph, Esq.* p. 77.

present. But the case of *Dobson v. Taylor*, cited from the reports of a gentleman as eminent at the bar in his day, as most of those who have succeeded him in practice in this country, (a) is a case resembling, and even stronger than the present. The circumstances of that case were: *Taylor* agreed to convey to *Anderson* his houses in *New-Castle*, on the first of *March*, 1750, for the consideration of 1,000*l.* payable at respective times. The first payment was to be *April* 1, 1751. *Anderson* died after the time *Taylor* was to convey, and his wife in prospect of this dower in the house, parted with her thirds in other lands which *Anderson* sold. After *Anderson's* death, (who was insolvent,) the question was, as *Taylor* had not conveyed, whether the wife of *Anderson* was dowable of this equitable interest. And it was decreed unanimously, with the exception of only one of the Court, that the widow was entitled to her dower therein. (b) And there the former General Court of this country, whose decisions have always been held and treated with respect by the Judges of this Court, in all cases where no contrary decision has taken place here, has with me the greatest weight, as settling this question near sixty years ago, in favour of the widow's right of dower in lands *bona fide* purchased for a valuable consideration, agreed for by the husband, and with the consent of the seller, entered into by the purchaser, and held by him though no deed for the same was ever executed.

Whether the Court in the decision of that case, proceeded upon the ground that the estate of a purchaser for a valuable consideration, is after entry and peaceable possession taken and held by him, with the consent of the seller, a *legal*, or merely a *trust*, or *equitable* estate, is immaterial in my mind. If the Court considered it in the latter point of view, I think it probable they thought, that where there was an agreement to convey to the husband at a certain time, so that the legal estate ought to be consolidated with the equitable estate, there it should operate as if it had actually been done. So that a woman should be

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dowable of an equitable estate, where that equitable estate ought to have been turned into a legal one ; as was argued by the counsel in that case. And this seems probable, as the purchaser died insolvent before any actual payment was made, though possibly bond for the purchase-money had been given. If equity, as defined by the writers on that subject, stands for the whole of *natural justice* ; (a) if natural justice respects not the difference of persons or of sexes ; if marriage be a civil contract ; *Bro. Ch.* 249. made upon a valuable consideration ; 2 *P. Wms.* 636. if trust estates are to be governed by the same rules, and are within the same reason as legal estates ; 1 *P. Wms.* 109. if it will be productive of the greatest uncertainty, if the rules of property be not the same in all Courts ; *Ibid.* 109. if dower be more favoured in law, and reason, than curtesy ; 2 *P. Wms.* 644. “ I cannot but wonder with the able and “ enlightened Master of the Rolls, (Sir Joseph Jekyll,) “ how it ever came to be thought, that a tenant by the “ curtesy, was entitled to relief in equity, more or farther “ than a dowress ; and particularly that a tenancy by the “ curtesy *might* be of a trust estate, BUT NOT DOWER ; “ which is no less than a direct opposition to the rule and “ reason of the law, allowing dower of a seisin in law, but “ not a tenancy by the curtesy, because the wife cannot “ gain an actual seisin, but the husband may ; which reason “ holds in a trust estate, for the wife cannot gain or com- “ pel a trustee to convey the legal estate to the husband, “ but the husband himself may ; therefore, if any distinction “ is to be made, dower (one would think) ought to be pre- “ ferred to curtesy.” 2 *P. Wms.* 638. This reasoning is more convincing to my mind, than all the oracular responses that have been made to it since. *Vide* 1 *Black. Rep.* p. 160, 161. per Lord Mansfield. And I am happy to feel the confidence I repose in this train of reasoning, supported and confirmed by the first tribunal in this country sixty years ago ; a tribunal which, as long as it existed, had the aid of as great talents at the bar, as any that ever assisted the deliberation of any Court in this quarter of the globe ; and

(a) 1 *Fenk.* 9.

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(a) *Vide*
Laws Virg.
1705. c. 19.
1753. c. 1.
1794. c. 64.

was composed of men, who probably understood the laws, usages, and constitutions of this country, better than any Judge in any other country whatsoever: nor ought it to pass without notice, that the oath of a Judge in Chancery for more than a century past, enjoins him to decide according to the *laws and usages* of VIRGINIA, not of *England*.(a) They found themselves, happily, under no necessity of conforming their better judgments to the practice of conveyances, as we are told by Lord Camden, *Amb.* 681. was the case with the House of Lords, in the decision of *Lady Radnor v. Vanderbendy*. If such a circumstance will justify that tribunal for departing from the general principles of law and equity, much more will a knowledge of the circumstances and *USAGES* in *this country*, support and justify the decision of the General Court, in conformity to these principles.

In this country mortgages and deeds of trust are every day's practice; and they are generally made in fee-simple. But I have scarcely ever known an instance of a reconveyance made by the mortgagee or trustee, although the mortgage or trust debt may have been fully satisfied and paid. If the widows of mortgagors are not dowerable in such cases, there are few widows in *Virginia* who may not be denied their dower in estates which have long been disincumbered, the *legal* title to which may still remain in some trustee, or mortgagee, or their heirs, although the possession has never been out of the mortgagor.(b) The counsel for the defendants have likened this to the case where a man previous to his marriage, makes a conveyance whereby he departs with the inheritance, in order to bar his wife of dower, as is said to have been done by Sergeant *Mayorard*.(c) urging that *Black* in not requiring a deed to be made to him at the time of the purchase, but having sold the property, shewed he intended his wife should not have dower. How far the case to which this is likened may be a good bar of dower, if such a conveyance were made in contemplation of a marriage, it will be time enough to decide when it happens. But the evidence arising from *Black's* own let-

(b) See *Proc.*
in Cha. 134.
Hitchin v.
Hitchin.

(c) *Show.*
Mar. Cas. 71.

ters to *M^r Rae*, (annexed to *John M^r Rae's* answer,) proves the contrary to this supposition of the defendant's counsel, and leaves no room for such a conclusion as he has drawn. He was *anxious* to obtain a deed.

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The next point which I shall notice, is the 3d objection on the part of the defendant. That the Court of Chancery had no jurisdiction at the time of the decree, over real estate in the District of *Columbia*, to effect an allotment of dower.

The act concerning the District of *Columbia*, 6 Cong. c. 86. (2 Sess. c. 15. s. 1.) continues the laws of *Virginia* in force in *Alexandria*. And section 13. provides for execution of judgments and decrees in suits then depending in the Courts of *Virginia* and *Maryland*. And our law of 1792, c. 151. s. 53. authorises the issuing from the Court of Chancery, writs of *habere facias possessionem*, or any judicial process which may issue from any Court of Common Law, according to the nature of the case. Consequently, if the plaintiff in this case be decreed to have her dower in the lot, the acts of Congress points out the method how that decree might be carried into effect without difficulty according to the law of *Virginia*. Besides, as to those parties who reside within the State, there can be no doubt that the Court can enforce its decree, as if the cession to the *United States* had never been made. Upon the point of *Mr. Henderson's* liability, I conceive that having renounced the executorship, and the trust connected with it, his having drawn the conveyance, (even if that fact were proved,) which I think is not the case, was not such an act as would make him liable, either as an executor or trustee, and consequently that as to him the bill ought to have been dismissed. But that in other respects the principles of the decree should be affirmed.

Judge ROANE. This is a bill exhibited by the appellee to recover dower in a lot in the town of *Alexandria*; to which the appellee, *Mrs. Claiborne*, claims title, as widow and relict of *William Black*, deceased. Prior to the year 1760, the

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said *William Black* purchased the said lot from *Allen M^rRae*, for which he paid a valuable consideration, but received no conveyance ; nor is it even shewn that the purchase was evidenced by any writing. In *January*, 1762, he intermarried with the female appellee : in 1766, he contracted to sell this lot to *Kirkpatrick*, for which in *May*, 1773, he passed to him deeds of lease and release ; and in 1782, *Black* died, having, by his will, which his widow duly renounced, made a provision for her, of property other than the lot in question, of which lot, also, no mention whatever was made in the will. *Black* was possessed of the lot in question *before* and after his marriage with the appellee, and until he sold it to *Kirkpatrick*, for a valuable consideration, by him duly received. The appellants *Henderson* and *Gibson* are sued as surviving trustees and executors of *Kirkpatrick*, who directed the property in question to be divided between certain devisees. *Kennedy* purchased the lot of the said executors and the *heirs of Kirkpatrick* in *September*, 1785, and then sold a moiety of it to *Wilson* ; neither of whom had any notice of the present claim, except such as may be construed to have arisen from the pendency of the present suit ; and *Ramsay* had been a previous purchaser, but had relinquished his purchase, conceiving there was a doubt about the title. In 1786, *John M^rRae*, the son and heir of *Allen M^rRae*, conveyed the lot of which the legal title was still in him, to the executors of *Kirkpatrick*, by a deed reciting the sale by *Black* to *Kirkpatrick*, and in consideration of 5s. which executors conveyed the same to *Kennedy* and *Wilson* in 1795 ; and afterwards a defect being discovered in their deed, in relation to the NUMBER of the lot, a deed was renewed to them for the same by *John M^rRae*.

The appellees, justly sensible of the objection which lay against a claim of dower in a trust estate, or a mere equitable title, alleged in their bill that a deed had been duly made by *Allen M^rRae* to *William Black* for the lot in question shortly after the purchase ; which being confided to *Elzey* to have it recorded, was by him lost : they pray a discovery as to this point, and that the said deed may be

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set up by the Court of Equity. Although there is no *iota* of proof that such deed ever existed, this allegation would, if it were otherwise necessary, (which it is not, under the established doctrines on this subject,) suffice, perhaps, to repel the objection to the *jurisdiction* of a Court of Equity to sustain a suit for dower.

There is no position in the law more undeniable than that a vendor of land, after a contract for a purchase, and before a conveyance is executed, is a *trustee* for the vendee. This is so established a principle, that although almost every page of the reports in equity act upon it as a *settled* doctrine, it is perhaps not easy to find *modern* authorities laying down the position in so many words: it is certain, however, that it has been considered as an established principle at least as early as 13 *Car. II.* as may be seen in the case of *Davie v. Beversham, Rep. in Chancery*, vol. 3. p. 2. This position emphatically applies to the case before us, in which, so far from being a conveyance *executed*, there is not even a written memorandum, stating the terms of the purchase, or the extent of the *interest* contracted for. This case then is that of a claim of dower by the widow of a *cestuy que trust* of lands, the *legal* estate in which remained in another.

From the evidence in the cause it appears, that in 1760, (*before Black's marriage*,) he wished a conveyance of the legal estate to be made to *himself*: (see his letter to *Allen M^r Rae* of May 22, 1760:) but there is no testimony whatever that he wished this to be done *after* his marriage: on the contrary, from the time of his contract with *Kirkpatrick*, he appears to have wished the deed to be made directly to *Kirkpatrick*; thus avoiding the trouble, circuitry, and risk attending the procurement of his wife's relinquishment of dower, after an intermediate conveyance to himself. [See his letter of November 3, 1764, and his two letters of July 20, 1767, stated in the record.] The answer of *John M^r Rae*, also, who was possessed of and had searched all his father's books and papers, states his belief, that from the year 1764 till 1766, a conveyance was "probably not desired by

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"*William Black*, but suspended in order to be made immediately to a purchaser, who seems during this period to have been sought for." The evidence of intention therefore arising out of these circumstances falls very strongly within the reason of a distinction taken, as a general one, (but since exploded,) by Sir *Joseph Jekyll* in the case of *Banks v. Sutton*; namely, that although a wife is dowable of a trust created by a stranger, she is not dowable of one created by her husband; because in the latter case, (otherwise in the former,) the husband is presumed to have intended to bar her dower. On no other ground than the existence of such an intention in the case before us, can the abandonment by Mr. *Black*, of his purpose to obtain a deed to himself, from and after the time of his marriage be rationally accounted for.

If, therefore, it is not necessary (under the later and more approved decisions) for the appellants to array this evidence of intention against the claim of the appellees, there is certainly, on the other hand, no ground of intention existing in the present case, which can be brought to act in their favour. The question then must be decided as a general one.

But for the elaborate decree of the Chancellor, in the case before us, and the opinion just delivered by the Judge who preceded me, I should have deemed it unnecessary to have consumed much time, in deciding a case so plain; for I hold it to be extremely clear, that, prior to our act of 1785, a woman was not dowable of a trust estate. These respectable opinions have imposed on me the task of investigating the subject somewhat at large; and it may not be useless, in a case of such importance, to state the authorities and reasons which have confirmed my former opinion. I will first refer to some adjudged cases upon this subject, and then notice the corroborative opinions of some elementary writers of high respectability. The cases which I shall cite have been some of them, considered *en masse*, inapplicable to the case before us, by the Judge who has gone before me. I differ from him, however, in this

particular, as far as I do in respect of the *authority* and *application* of the case of *Dobson v. Taylor*, notwithstanding the encomium he was pleased to pronounce on it, and the Court who decided it.

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With this preliminary observation I proceed to examine some of the cases and authorities. In the case of *Bottomly v. Fairfax*,^(a) it was held that if a husband before marriage conveys an estate to trustees in such a manner as to put the *legal estate* out of him, though the *trust* be limited to him and his heirs, of this trust-estate his wife shall not be endowed. It is not easy to discern a difference between that case and the one at bar, unless it be said (in conformity to the distinction before noticed to have been taken and since exploded) that the trust in the case at bar was created by a *stranger*, and in the case of *Bottomly v. Fairfax* by the husband himself: but it is certain that, in *both* cases, the trust was created by the husband: in the last case, it is true, by making a positive conveyance in trust; in the case at bar, by merely omitting to procure a *legal* conveyance. The husband, however, is the efficient person in both cases, and the difference does not exist in substance but merely in form. If that exploded distinction could ever have justly applied to any case, it must have been to one wherein the husband was merely *passive*, one in which the "*trust descends or comes*" from another (see *Godwin v. Winsmore*, *post*) who could not be presumed to have intended to *bar dower*. That is not the case, in the present instance: but if the husband were even considered as merely *passive*, touching this estate in its origin, the before mentioned testimony shews, that from and after his marriage, he came forward and wished (by waiving a conveyance to *himself*) to keep up the *trust-estate*, until it became a *legal* one in his vendee, *Kirkpatrick*, by an immediate conveyance to him from his vendor *M'Rae*.

(a) *Prec. in*
Cha. anno
1712.

The case of *Banks v. Sutton*,^(b) decided by Sir *Joseph Jekyll*, Master of the Rolls, in 1732, was in substance as follows. *Hancock* mortgaged land in fee to *Ward*. *Hancock* afterwards devised his real and personal estate to Sir *W. Ellis*,

(b) 2 P.Wms.
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in trust, to pay debts and legacies, &c. and then to settle on *Robert Sutton and his heirs, on his attaining the age of twenty-one years*, a moiety of his estate. *Hancock* died. *Ellis* entered on the lands, and possessed the personal estate; paid off the mortgage, and took assignment of it to himself, &c. *Robert Sutton* attained the age of twenty-one, and married: the estate was *not settled* on him; and after his death, his widow was decreed her dower in the trust-estate, and in the equity of redemption of the mortgage. That case was very elaborately argued by the Master of the Rolls, but has been since *overruled*. If, however, it were not so, it would be no authority against the present appellants. As to the dower in the *general trust-estate*, it was decreed on the ground that that estate had been created by a *stranger*, (*Hancock*), from which circumstance it was argued that no intention to bar dower could be inferred; and also on the ground that a *time* was limited for conveying the legal estate, viz. *Robert Sutton's* attaining twenty-one years of age, and had arrived in the life-time of the plaintiff's husband; and it was decided that the principle, that what was agreed to be done should be construed as if it were done, sustained the claim of the widow. In both these respects that case is different from our's; (but if it were not so, both those grounds of decision have been overruled;) for 1st. In our case no time was limited (nor had arrived, during the marriage) for the legal conveyance to be made; and 2dly. The trust-estate was here created by the *husband*, originally; or if this be not so, his intention to *dispense with a legal conveyance to himself*, commenced with his marriage, and continued during the whole period thereof. Admitting, therefore, that this decision (in *Banks v. Sutton*) was correct, as applying to that particular case, it would not embrace the case before us. This is made more manifest by the following passage in the opinion of the Master of the Rolls: "but after all these reasons and authorities, I must declare that I would not take upon myself to determine whether a wife should

“ have dower out of a trust of inheritance, where it is
 “ created *not by the husband*, but by some other person,”
 (he had previously said that, of a trust created by the *hus-*
band, the wife shall not have dower,) “ and *no time limited*
 “ for conveying the *legal estate* : when that comes to be the
 “ case it will be time enough to do it ; but the present dif-
 “ fers very much from the *common case of trust-estates*, in
 “ that there is a *time limited* for conveying the legal estate,
 “ and *that time come* in the life of the plaintiff’s husband.”
 As to his decision, that the wife was dowable of the equity
 of redemption of the mortgage in fee, that is not the case
 before us ; it is, however, but another side of the same
 question, (for a mortgagor in fee, after the mortgage mo-
 ney is paid, is a *cestuy que trust* of the inheritance,)(a) and
 has since been often overruled.

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(a) 1 Bac.
 Gwyll. edit.
 185.

(b) 3 P. Wms.
 229.

In the case of *Chaplin v. Chaplin*, in 1733,(b) it was de-
 cided by Lord Chancellor Talbot, after much debate and con-
 sideration, that the wife of a tenant in tail in trust of a rent
 (created by a *stranger*) was not entitled to dower in it. After
 taking up the case of *Banks v. Sutton* and the cases therein
 cited, and giving answers to (or overruling) them all, he
 proceeds to say, “ that a woman is no more dowable of a
 “ trust now than she was of a *use* before the statute ; that
 “ it had been the constant practice of conveyancers, agreea-
 “ bly thereto, to place the *legal estate* in trustees *on purpose*
 “ to prevent dower ; wherefore it would be of most dan-
 “ gerous consequence to titles, and throw things into confu-
 “ sion, contrary to former opinions and the advice of so
 “ many eminent and learned men to let in the claim of
 “ dower upon *trust-estates* ; that he took it to be settled that
 “ the husband should be tenant by the curtesy of a trust,
 “ though the wife should not have dower thereof ; for
 “ which diversity as he could see no reason, neither should
 “ he have made it ; but since it had prevailed, he should
 “ not alter it ; that there did not appear to be so much as
 “ one single case, where, abstracting from all other circum-
 “ stances, it had been determined there should be dower of
 “ a trust ;” and he dismissed the bill so far as it claimed

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dower in the trust in question. The reporter adds, in a note, that afterwards, in the case of *Shepherd v. Shepherd*, (March, 1735, 1736,) heard before Lord Talbot, the same point coming in question, the *Attorney-General* and Mr. *Fazakerley*, who were of counsel with the widow, apprehended it to have been so clearly settled by the above resolution, that they both declined speaking to it.

(a) *Cases*
temp. Talb.
128.

In the case of the *Attorney-General v. Scott*, (in 1735,) before the same Chancellor, (a) it was decided that the widow of a *cestui que trust* of an estate in fee which was mortgaged was not entitled to dower. The case of *Banks v. Sutton* and others being cited, the Lord Chancellor said, "The question is very considerable, and very proper to be settled. Dower is properly a legal demand, and here the estate is limited to trustees and their heirs, to the use of them and their heirs; so that it is actually executed in the trustees, and whatever comes after can only be looked upon as an equitable interest: for there cannot be a use upon a use. The question therefore is, whether the feme of the devisee shall be entitled to dower at law?" "No dower was of a use before the statute; it being entirely a legal demand; (b) and then how can she be dowerable of a trust after the statute, since no difference can be assigned between a trust now and a use before the statute, and Courts of Equity must follow the same rules now as to trusts, as prevailed before the statute as to uses. How the difference now received between tenant by the curtesy and tenant in dower ever came to be established I cannot tell; but that it is established is certain; nor have I heard of ANY CASE cited to the contrary, but that of *Fletcher v. Robinson*," (a case much relied on in *Banks v. Sutton*, and overruled in the case of *Chaplin v. Chaplin*,) "which was determined upon another reason that does not affect the present case. That of *Bottomly v. Fairfax* (ante) is an exact authority that a woman shall not be endowed of a trust, and the received practice of inserting trustees to bar dower would otherwise be of no signification. For me, therefore, to do a thing merely upon the authority of

(b) *Vernon's*
case, 4 Co. 1.

"an obscure case, (*Fletcher v. Robinson*,) which does not seem to have been determined upon that point neither, and that might, perhaps, shake the settlements of 500 families, is what I cannot answer to my conscience."

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When the Lord Chancellor *here* says that he has not "heard of any case, cited to the contrary," it is evident that he did not consider the case of *Banks v. Sutton*, as going to the general doctrine; and thus his construction thereof accords with the ideas I have before stated upon that subject.

The case of *Godwin v. Winsmore*, in 1742, (a) before Lord Chancellor Hardwicke, was a bill by a widow for a customary estate. The husband's father bought the lands which were conveyed to him and D. and the heirs of the father: the father dies after devising the lands to the husband in tail: D. survived the husband: the bill was dismissed; and, by the Lord Chancellor, "it is an established doctrine now that a wife is not dowerable of a trust-estate: indeed a distinction is taken in *Banks v. Sutton*, in regard to a trust where it descends or comes to the husband from another, and is not created by himself; but I think there is no ground for such a distinction, for it is going on suppositions which hold on both sides; and at the latter end of the report Sir Joseph Jekyll seems to be very diffident of himself, and rested chiefly on another point of equity; so that it is no authority in this case. But there is a late authority, in direct contradiction to the distinction above taken in *Banks v. Sutton*, before Lord Talbot; the case of the *Attorney-General v. Scott*." (ante.)

(a) 2 Atk.
525.

In the case of *Casborn v. Inglis*, (1737,) (b) Lord Hardwicke held, that if a woman seised of land, mortgages it, and marries, and the mortgage be not redeemed during the coverture, the husband shall be tenant by the curtesy: he admits the distinction before noticed between curtesy and dower, and says that "if any innovations were to be made, it would be the nearest way to right, to let in the wife to dower of a trust-estate, and not" (as was contended) "to exclude the husband from being tenant by the curtesy of

(b) 1 Atk.
603.

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(a) 1 Bro. Ch.
Rep. 326.

"it." And in *Dixon v. Saville*, in 1783,(a) it is directly decided that where the husband died *seised* of the premises in fee, the estate being mortgaged in *fee* before the marriage, and still continuing so, the wife is not entitled to dower. It was so decided, notwithstanding the husband had made no provision for his wife, except by giving her a carriage and horses, thinking, as his counsel argued, that his wife would be entitled to dower: and the Chancellor very briefly said that the "law was so much settled that he thought it wrong to discuss it, and that the argument in the cases cited" (on behalf of the wife) "has generally sprung from *compassion*." In that case the argument from *compassion* eminently existed and yet was overruled; whereas, in our case, the wife had, by the will of her husband, an *ample* provision, which, however, she rejected, and is now in possession of her legal share of his estate. In that case, too, the husband was not only *seised* of the land during the coverture, but *did seised*; whereas, in the case at bar, although the husband was entitled to the land during the coverture, he did not *die seised*, but on the contrary had sold it for a valuable consideration duly received; a part of which, either in the shape of real or personal estate, the appellees are probably at this moment enjoying. That case then is stronger than the one before us, and would seem to be a conclusive authority.

(b) MS Rep.
by J. Randolph.

As to the case of *Dobson v. Taylor*, April General Court, 1751,(b) it was eminently a case of *compassion*. The wife of *Anderson*, in consideration of this dower in the equitable interest, parted with her *thirds* in other lands sold by her husband; whence it was argued that the wife was a *purchaser* of the interest in question; and, besides, her husband had died *insolvent*, so that she would have been *wholly destitute of support* had she not prevailed in this instance. It is also to be remarked that *Anderson*, the husband, died "after the time *Taylor* was to convey" the houses, which is a circumstance very much relied on by the Master of the Rolls, in the case of *Banks v. Sutton*, as before mentioned; whereas, in the case before us, *no time was limited for the*

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conveyance, nor consequently had arrived during the cover-
ture. In these respects, however, the case of *Dobson v. Taylor* is widely different from the case before us: respect-
ing this case I can say with Lord *Talbot*, in the case of *Chaplin v. Chaplin*, (*ante*.) that "it is not a case in which
"abstracting from all other circumstances, it has been de-
"termined that there should be dower of trust." Admit-
ting, therefore, the authority of the old General Court, to
establish the law on this subject, in derogation of the de-
cisions of the Court of *dernier resort*, in *England*, and ad-
mitting also the correctness of the decision as it applied to
that particular case, (neither of which admissions am I at
present prepared to make,) it does not follow that that de-
cision is a conclusive authority for the appellees, in the case
before us.

On the subject of precedents, I will beg leave to say, that
it has never been pretended that the decisions of the old Ge-
neral Court have been considered conclusive as to rules of
property, except in relation to subjects peculiar to *Virginia*,
(slaves for example,) or, perhaps, on other subjects where
there has been a series of uniform decisions in that Court,
establishing the rule, and none of which have been reversed
by the Court of *dernier resort* in *England*. The most that
has been contended for is, to place those decisions on as
high ground as the decisions in the Courts of *Westminster-
Hall* in *England*: (See the opinion of Judge *Pendleton*,
in *Wallace v. Taliaferro*, 2 *Call*, 489.) but, as a series of
uniform decisions by those Courts, would undoubtedly over-
rule a solitary decision by one of them, (which by being
single has perhaps not grown into a rule of property,) and,
especially, when it is distinguishable from the other cases
in particular and material circumstances; so, undoubtedly,
would such a series of decisions by those Courts overrule a
single decision of the latter class made by a coequal Court
in this country, whatever may be the case of single and re-
cent decisions which have neither been long acquiesced in,
nor grown into rules of property. The sanction of this
Court in relation to "uniform decisions which establish

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(a) 1 Wash.
302.

(b) Ibid. 322.

(c) 1 P. Wms.
410.

(d) 2 P. Wms.
2.

(e) 3 Atk. 5.

(f) Ibid. 140.

(g) 1 Black.
Com. 70.

"rules of property" has been given in many cases; of which those of *Minnis, Executor of Aylett, v. Aylett*, (a) and *Boswell v. Jones*, (b) and which are strong, are at present recollected. As to the ideas of the *English Courts* on this subject of precedents, it will be seen that Lord Chancellor King declared in *Chauncey's case*, (c) that he was not for breaking in upon a general rule, although he did not himself see the propriety of it: that, in *Dawes v. Ferrers*, (d) the Lord Chancellor interrupted the plaintiff's counsel, saying he would never suffer the bar to dispute what was the foundation and landmarks of the law; though what they contended for might be reasonable if it were then to be first adjudged, yet, whatever the law was, provided it were known and certain, it would be well for the subject, though in some particular instances, it might be unreasonable; that in *Dormer v. Parkhurst*, (e) it was said to be the less evil to make a construction even contrary to the rules of the common law, than to overthrow 100,000 titles; and that in *Everlyn v. Evelyn*, (f) it is held that "successive determinations make the law." To these I will add the doctrine of Judge Blackstone on this subject; (g) "that precedents and rules must be followed, unless flatly absurd and unjust; for although their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose that they acted wholly without consideration." These are a few of the innumerable instances to be found in the books, of a reverence for decisions, and rules of property which have been established by the concurrent decisions of successive Judges, and acted under, for a long series of time. They ought to be adhered to as the *sine qua non* of all certainty and stability in the law, the private opinion of any single Judge to the contrary notwithstanding.

I come next to the corroborative opinions of certain elementary writers, of high respectability.

In the treatise of equity, on which *Fonblanque* has annotated, which was published in 1737, and is a work of great merit, it is said, (vol. 2. p. 103.) that dower is not allowed

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out of a *trust estate*, nor was it anciently of a *use*, though no manner of reason can be given for it if it were *res integra*; but that the authorities are *clearly so*, and it would overturn many settlements to make an alteration in it; and in the *notes* by *Fonblanque* it is said to be now settled that there shall be no dower in a trust-estate of inheritance whether created by the husband or a stranger; and that it will not differ the case, if the husband has even obtained a decree directing the trustees to convey to him the legal estate; and in *Ryal v. Rowle*,^(a) it is said by Lord *Hardwicke*, that the only case in which as to rules of property, Courts of Equity do not follow the law is that a woman is not dowable of a trust-estate. In 1 *Fonb.* 414. it is said that money decreed to be laid out in land is considered as land, (on the principle that what is agreed to be done shall be considered as done,) *inter alia*, so as to be subject to the curtesy of the husband, but it will not entitle a woman to dower.

(a) 1 *Vesey*,
357.

In 2 *Black. Com.* 128. it is said that tenant in dower is where the husband is *seised* of an estate of inheritance, &c. and, again,^(b) the Courts now consider *trusts* either when declared or resulting by implication as *equivalent* to the legal ownership, &c. except that they are *not yet subjected to dower*; more, the author adds, from a cautious adherence to some *hasty precedents* than from any well grounded principle. It is true that I have seen no good reason assigned for the exclusion of the case of dower: but the foregoing cases shew that the law on this subject, if it arose originally from hasty precedents, has since been *established* by the solemn and deliberate adjudications of some of the greatest Chancellors who ever held the seals in *England*. These numerous and uniform decisions, would seem to conclude this question. But, before I dismiss the subject, I will beg leave to avail myself of the testimony of a late writer of our own country respecting it. In the new edition of *Black. Com.* vol. 2. p. 128. the editor, after transcribing, in his note, the act of 1785, upon this subject, adds, "in cur-
tesy the law seems to have always been that a husband

(b) *Ibid.* 137.

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(a) 1 Bro. Ch.
Rep. 328.
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" might be tenant by the curtesy of a *trust-estate*, in some
" cases where a wife would not be endowed of such an es-
" tate : for, if the wife, make a mortgage in fee before mar-
" riage, (*Casborn v. Inglis, ante*,) the husband shall be te-
" nant by the curtesy of the equity of redemption ; but, if
" the husband had made a mortgage in fee, and afterwards
" married, the wife could not be endowed of this equity of
" redemption." (a) Again, in p. 131. after again inserting
the act of 1785, he adds, " IN CONSEQUENCE OF THIS ACT it
" would seem that a wife might now be endowed of a *trust-*
" *estate* in some cases where it was formerly held, that she
" could not be endowed." The editor then states several
cases of trust-interests, in which he supposes she is *now* dowable,
and in which it had been formerly decided otherwise ;
and adds, " In the case last cited, (*Godwin v. Winsmore, ante*),
" Lord *Hardwicke* lays it down as an *established doctrine*,
" at that day that a wife is not dowable of a *trust-estate*,
" and that she was not dowable of a *use* before the statute
" of 27 *Hen. VIII.*" and in p. 337. after again transcribing
the act of 1785 on this subject, the editor adds, " BY THIS
" ACT the question frequently agitated in the *English*
" Courts of Equity, viz. whether a widow be dowable of
" a *trust-estate*, seems to be decided." If any thing further
was necessary to shew that *by* the act of 1785, the law
on this point was *altered*, that aid might be derived from the
terms of the act itself. They are that " where any person,
" to whose use, or in trust for whose benefit another *is or*
" *shall be* seised of lands, tenements, or hereditaments,
" hath or shall have such inheritance in the use or trust as
" that, if it had been a *LEGAL right*, the husband or wife
" of such person would have been entitled to curtesy or
" dower, such husband or wife shall have and hold, and
" may, by remedy proper in similar cases, recover curtesy
" or dower of such lands, tenements, or hereditaments."
(*V. L. 1785. c. 62.*)

This statute, in its nature *prospective*, does not purport to
be a *declaratory act* ; the character of which is that, " for
" avoiding all doubts and difficulties, it *declares what the*

“common law is and *ever hath been.*”(a) It does not attempt the vain purpose, as some of our acts have sometimes done, by express words, to impugn and reverse the ANTECEDENT decisions of the Courts. It merely goes to *alter* the law in question, as to all those cases in which the rule as antecedently settled, might be at variance with the standard set up by this act.

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(a) 1 Black.
Com. 86.

Sensible as I am that this great question, shaken by the decree in the present case and the opinion just delivered, ought for the public good to be fairly met and promptly decided, I have thus chosen to go somewhat at large into it. I am not *sure* that this was *absolutely necessary* in order to sustain the case of the appellants in the present instance. Several subordinate points were made, which it will not be necessary for me to decide, (nor have I duly considered them,) unless the opinion of the Court were adverse to my own upon the principal question. This Court having imposed upon it the immense responsibility of settling the law of the country, (as well as deciding the causes of the suitors,) I am sensible that great mischief may result, as well from deciding *too much*, as from taking *too wide a range* in relation to what ought properly and necessarily to be decided. For this reason, I shall pass by, for the present, several topics which were urged in the argument, and several which are contained in the Chancellor's decree. In that decree, however, there is one topic which I cannot entirely pretermitt.

The decree states, that *English* Chancellors, for reasons *peculiar* to that country, or *not existing* in this, have denied the application of the maxim, “that what is agreed to be “done shall be considered as done,” to the claim of *dower*, though they have admitted it to favour an estate by the *curtesy*. That venerable Judge may have known the *peculiar* reasons, which existed in *England*, and do not exist here, supporting the distinction as in that country, although the preceding authorities shew that the eminent Chancellors and writers I have quoted, were *ignorant* of such reasons. They took it up, as I shall, as a rule of property,

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which has been *established*, and which it is essential to the peace of the nation should be adhered to. If, however, in the darkness in which I am enveloped, as to the reasons of the rule, I should indulge myself in conjecture, I should say, without hesitation, that the reasons were perhaps more *strong* in favour of the claim of dower in *trust-estates* in *England* than in this country. In this *new* country where many people hold their lands by *patent* rights, where the deeds of conveyance are usually extremely *simple*, and conveyances in trust very rare, it is evident that widows would more generally be entitled to dower (under the existence of the principle in question) in our country than in *England*. In that country, settlements in trust, with all the *paraphernalia* of conveyancing, appear every day in all their variety: the right by patent is obsolete through lapse of time, and the simple modes of conveyance are comparatively rare. The *interests* of dower therefore called much more loudly for a change of the rule in that country than in this. But, while, for the foregoing reasons, in this country, the observance of the rule in question would but seldom have deprived a widow of her dower in lands *permanently owned* by her husband, the relaxation of it, prior to the commencement of the act of 1785, and its operation since, would, *perhaps*, in many cases where imperfect titles to lands not intended by the husband for *permanent* ownership have passed, or may pass, through *many hands*, as a species of merchandise, and on the transfer of which the husband has received, or may receive, a valuable consideration, which has enured, or may enure, to the benefit of the wife, (as in the case before us,) clog those transfers with innumerable claims of dower, and otherwise be productive of infinite litigation and injustice.

The position taken by the Judge who preceded me, that the paying for this land, and gaining possession of it by *Black*, conveyed to him a *legal* estate in the premises, is at least a *new idea* in this country; it is at least a *new discovery*. While hundreds of bills in equity have been brought to coerce *deeds*, under like circumstances, it is pre-

sumed that no man, for the last century at least, has supposed that he could recover land in ejectment, on such a title. That *common error*, under which all the Judges, all the lawyers, and all the people of this country have so long acted, must outweigh all speculations to the contrary, however ingenious and elaborate. In the language of *Blackstone*, "we owe such a deference to other Judges and former times, as not to suppose that they acted wholly without consideration." This consideration ought to weigh in this case, were the words of the act even less imperious than they are. In a case so plain it is difficult to quote authorities. I believe however, that I have *one* which fully applies to the case before us.

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In the case of *Rowton v. Rowton*,^(a) the fact was, that the son, whose widow claimed dower, had removed to a tract of land *at the express instance of his father*, possessed it several years during the coverture, and *laid out money and labour* in improvements, and died in possession of it. It was not denied, and cannot be, that this consideration is entirely equivalent to that of *money paid*. Notwithstanding the circumstances aforesaid, the father actually recovered the premises from the widow of the son after his death, in the District Court of *Prince Edward*, on the ground that the *LEGAL* estate was in him. This decision was *acquiesced* in, and not appealed from as at law; but a bill in equity was brought to establish the right of the widow in equity, and let her in for dower. The transaction having happened *subsequent* to the act of 1785, the widow claimed her dower *only* under the provision of that statute. Three of the Judges overruled her claim; but it was on the ground of no contract having been proved on the father, as they thought, for more than a *LIFE* estate in favour of the son: two other Judges thought that the son had an *EQUITABLE* estate in fee, on the testimony, and, on that ground, were in favour of the dower under the act of 1785. It never entered, however, into the head of any man at the bar, or on the bench at that time, that the son had a *LEGAL* estate in the premises. The counsel in opposition to the claim of

(a) 1 Hen.
& Munf. 94.

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the wife, stated that it was not even ASSERTED by his adversary that the son had the *legal* estate in the premises ; nor was it asserted by any of the adverse counsel, although *some* of them are at least as learned in the black letter as is necessary. The same counsel also admitted that, *under the act of 1785*, the widow was entitled to dower, provided it should appear that her husband had such *an equity in a fee-simple estate as would authorise a Court of Equity to DECREE THE LEGAL ESTATE* ; which, however, he denied to be proved in the cause : it never entered into his head that it would be contended that the son had in fact the *legal* estate, by reason of the *promise*, the *possession*, and the *consideration* paid for the same. In deciding the case the Judge who has just spoken, *disclaimed*, in effect, the position he now advocates, by not contending for it then ; by contending, on the contrary, that these circumstances entitled the son to “*a PERFORMANCE of the father's promise,*” in a manner the most beneficial for himself and family.

Judge *Carrington*, who concurred in opinion with Judge *Tucker*, says, (after viewing the testimony in the same light with him,) “thus I think an *EQUITABLE* title to hold the “land in fee-simple was vested in the son.”

I consider this case as a strong authority on this point ; it was eminently a case of *compassion* ; for the wife was “abandoned to want and distress” by the decree of the Court. No lawyer and *no Judge* contended that the son had *more* than an *equitable* estate in the premises ; and the case would probably have been given up on the part of the widow, but for the intervention of the act of 1785 ; and yet there was an *agreement for a fee*, (according to the opinion of two Judges,) *long possession* during the coverture, and money and labour laid out and expended. It did not, however, occur to the *counsel* in that case, (more than in the case before us,) that these circumstances gave a *legal* estate to the son, in the total absence of a deed or other writing. In coming to this conclusion, the two Judges in this case, like their predecessors in former times, no doubt had the

act of 1734, now relied on, before them, as well as the act of 1710; and when we consider that that act has never been relied on for the purpose now contended for, through a long course of time, either by the bench or bar, it affords a strong presumption that the construction now set upon it, by the Judge who preceded me, is not to be maintained.

The words of the act of 1710, which I suppose to be so imperious, are, "that no lands, tenements, or hereditaments shall pass, alter, or change from one to another, whereby an estate of inheritance in fee-simple, fee-tail, &c. shall be made or take effect in any person or persons, or any use thereof to be made by *bargain and sale*, lease and release, &c. or other instrument, UNLESS THE SAME BE MADE BY WRITING indented, sealed and recorded," &c.(a) Is it possible that any words can be more conclusive than these, to shew that no estate of inheritance passed from *Allen M'Rae* to *William Black*, for want of a *writing indented and sealed*, and that, consequently, his wife was not entitled to dower.

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(a) Old code
of Vir. Laws,
edit. of 1733,
p. 257.

Such is decidedly my opinion upon the *general* question. Some objections arising out of this particular case deserve, however, to be briefly noticed.

It is said that the *acceptance* by *Kirkpatrick* of the deed from *Black*, of *May* 1773, estops him and those claiming under him, from objecting that *Black* had not the legal title. I answer that equity is not fond of estoppels, especially in a case which is so far from being a case of *compassion*, that the widow would in fact get *double portions*. But could that deed be construed to have that effect? It indeed amounts to a complete *covenant*, on the part of *Black*, to assure a perfect title; but it is remarkable that the deed itself does not deduce the title down to *Black*, but stops at *Allen M'Rae*, having deduced the title no further. I consider, therefore, that BOTH parties understood at the time that the legal title was not *then* in *Black*, but in *M'Rae*, although *Black* covenanted to procure and convey one; and this idea is fully supported by the testimony.

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It has been said by counsel, that the appellees in this case might elect to consider *Black* as a *disseisor*, and that the wife of a disseisor is entitled to dower. I shall not stop to inquire whether this position be tenable or not; but it is evidently in conflict with another ground of title set up in this case, which is, that the purchase in this case for a valuable consideration, accompanied with possession, conveys a LEGAL title. This idea of election is also reprobated by the appellees' own statement in their bill, that they had actually received a *deed* for this land, which, by accident, has been lost. Both these grounds and pretensions are entirely incompatible with the idea of a *disseisin*, which is defined to be "a *wrongful putting out* of him that is seised of the "freehold." (a)

(a) 3 BL 145.

I have thus viewed this claim of dower as one which (however founded in morality and justice) must, *as to the extent thereof*, be regulated by the rules of law; and that we are as much at liberty to violate those rules, in relation to the *portion of interest* claimed for dower, as in relation to the *nature and quality* of the estate out of which it is to issue: I have considered that the law on this subject is *settled*, perhaps beyond the power of *any* single case, and certainly beyond the power of the *single and varying* case of *Dobson v. Taylor*, to affect or alter: that the case before us, so far from being a case of *compassion* on the part of the widow; so far from presenting the instance of a widow destitute of all other means of support, as was the fact in the case of *Dobson v. Taylor*; presents the spectacle of an application to a *Court of Equity* for *DOUBLE portions*; for, while the appellees are actually enjoying the price given as an equivalent, they demand also their share of the thing for which that price has been received: I have supposed that great and unforeseen clogs and mischiefs would result from carrying this doctrine to the extent contended for on the part of the appellees, in relation to a country in which lands held by equitable title only, pass, in some sense, as a species of merchandise; while, at the same time, the widows are entitled to their share, under the act of distributions, of the

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price for which such lands have been sold ; and it is also true that almost all lands intended for *permanent ownership*, are in this country held by perfected *legal* titles ; and that, however this may be as a matter of policy, and, whatever may be the true construction of the act of 1785, on this subject, that act has neither altered, nor had the Legislature power to alter the law, as it related to pre-existing cases.

On a long and deliberate consideration of the case, I must therefore declare it as my opinion that the decree in question is erroneous, and ought to be REVERSED, and the bill of the appellees DISMISSED.

Judge FLEMING. Two questions are presented in this case :

1st. Whether *William Black* had a legal estate in the lot No. 26. in the town of *Alexandria*, during his coverture with the appellant, *Mrs. Claiborne* ? and if not,

2dly. Whether she is dowable of the equitable estate ?

With respect to the first point, it is laid down, *Co. Litt.* 9. a. and 121. b. and in other cases which have been cited, that corporeal hereditaments, which lie in livery and seisin, either in deed or in law, may pass to a purchaser for a valuable consideration, without deed ; and it was argued, that as *William Black* purchased the lot in question of *Allen M^r Rae*, paid the purchase-money, and, by his agent, received rents for the same, it amounted to a seisin in law, and vested the legal estate in him, and consequently, that having the title so vested, during the coverture, his widow was instituted to dower therein.

This position may be correct at common law, but it appears to me that our act of Assembly of 1748, which was then in force, and which I conceive to be imperative, has effectually overruled the doctrine. By that act it is declared that " no lands, tenements or hereditaments, within the " then colony, shall pass, alter, or change from one to another, whereby any estate of inheritance in fee-simple, fee-tail general or special, or any estate for life or lives, or

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“ any greater or higher estate, shall be made or take effect
 “ in any person or persons, or any use thereof to be made,
 “ by bargain and sale, lease and release, deed of settlement
 “ to uses of feoffment, or other instrument, unless the same
 “ be made by writing, indented, sealed and recorded, in the
 “ records of the General Court, or of that County where
 “ the land mentioned to be passed or granted shall lie, in
 “ manner following, that is to say, to be recorded within
 “ eight months, where the party making the same resides
 “ within the colony, and not admitted to record unless ac-
 “ knowledged in court, by the grantor in person, to be his
 “ or her act and deed, or else that proof thereof be made, in
 “ open Court, by the oaths of three witnesses at the least.
 “ And all deeds, conveyances, &c. not made and recorded
 “ according to the directions of the said act, declared void,
 “ as to creditors and subsequent purchasers, but are never-
 “ theless valid and binding between the parties and their
 “ heirs, although not recorded.” But there being no proof
 that any deed or writing ever passed between *M^r Rae* and
Black, for conveying the said lot, it appears, to me that
 the latter never had a *legal* title to the same, and conse-
 quently, that neither he, nor any claiming title under him,
 could have maintained an ejectment to recover possession
 thereof, but must have resorted to a Court of Equity to
 perfect the title. And having an equitable title only, we
 are next to inquire whether the widow be instituted to
 dower in the premises?

There have been some contrariety of opinions on the
 subject amongst the Judges in *England*, and a distinction
 taken between cases where dower is claimed against the
 heir, and against a purchaser, in favour of the latter.
 The principal case that seems to favour the claim of the
 appellants, is that of *Banks v. Sutton*; (a) but that case has been
 long since overruled in a number of instances; and it seems
 now well settled that a wife shall not be endowed either of
 a trust estate of inheritance, or of an equity of redemption
 of a mortgage in fee. And Lord *Hardwicke*, in giving his
 opinion in the case of *Godwin v. Winsmore*, (b) observed

(a) 2 P. Wms.
701.

(b) 2 Atk.
25.

that there was no ground for the distinction taken by Sir Joseph Jekyll, in the case of *Banks v. Sutton*, in regard to a trust, where it descends or comes to the husband from another, and where created by himself, as in the case of *Bottomly v. Lord Fairfax*.(a) And his Lordship cited the case of the *Attorney-General v. Scott*, before Lord Talbot, as overruling the case of *Banks v. Sutton*; also *Chaplin v. Chaplin*,(b) and other cases that have been cited. And in a late case of *Dixon v. Saville*,(c) it was decided by the Lords Commissioners, *Loughborough, Ashhurst, and Hotham*, unanimously, that a widow is not dowable of an equity of redemption; and this in a case too, where a very trifling provision was made for the widow, by her husband's will, which is not the case in the cause now before the court, as Mrs. *Claiborne* now enjoys a very handsome dowry in her late husband's estate; and the contest is now between her and fair purchasers, for valuable considerations, without actual notice of her intermarriage with *William Black*. Indeed there has not been, that I recollect, a single case adduced, where a woman has been endowed of a mere equitable estate in the husband.

On these grounds then, and on these authorities, I am of opinion that the decree is erroneous, and ought to be reversed, and the bill of the complainants dismissed with costs.

By a majority of the Court, the decree of the Chancellor reversed, and the bill DISMISSED.

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(a) *Prec.*
in *Cha.* 336.

(b) 3 *P.Wms.*
234.

(c) *Bro. Ch.*
Cas. 326.

Monday,
March 30,
1809.

Kirtley against Deck.

In case for slander, if the defendant plead the word "justification" only, and the plaintiff reply generally, a verdict for the defendant should be set aside, and a repleader awarded: but a verdict for the plaintiff ought not to be set aside, it being a rule, that "a repleader is not grantable in favour of the person who made the first fault in pleading."

The declaration charging the defendant with having said that the plaintiff, as a witness before a Court of Record, was guilty of perjury, "for which he would have his ears," the defendant on the plea of justification, cannot give parol evidence of what the plaintiff swore to, without producing a copy of the record of that trial, to shew that the testimony given by the plaintiff was material to the matter in question.

THIS cause came before the Court by appeal from a judgment of the District Court of Staunton, rendered in favour of the plaintiff, the present appellee.

Michael Deck instituted an action for slander against *St. Clair Kirtley*, and after stating a colloquium, charged the words spoken in different forms, thus: "*Michael Deck* has sworn to a lie and I can prove it."—" *Michael Deck* is perjured, and I can prove it."—" *Michael Deck* has taken a false oath in *Rockingham* Court, in a suit betwixt the Commonwealth and me, and I will have his ears for it." *Plea.* "Justification" generally: to which the plaintiff replied generally.

At the trial, the defendant tendered a bill of exceptions, which was sealed by the Judges, and stated, that "the defendant to support the issue joined on his part, produced a witness to prove what the plaintiff had sworn to, in the trial of the cause in *Rockingham* Court, referred to in the declaration; to the admission of which evidence the plaintiff objected, alleging, that the record of that trial ought to be produced, to shew the materiality of the matter of evidence, which was given by the said plaintiff; which objection was sustained, and the evidence withheld from the Jury by the Court." Verdict and judgment for the plaintiff; from which the defendant appealed to this Court.

Wirt, for the appellant. There was no issue joined in the cause; and the whole was a mis-trial. In *Kerr v. Dixon*(a) it is expressly decided, that if the defendant plead "justification," only, and the plaintiff reply generally, no issue is joined.

[Here *Mr. Wirt* was stopped by the Court, who requested the opposite counsel to state the difference between this case and that of *Kerr v. Dixon*.]

Wickham. The important difference is this: In *Kerr v. Dixon*, the judgment was given in favour of the party who pleaded "justification;" here it is given against him.

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Wirt. The error is a vital one; for the cause was tried without any issue, and a repleader ought to be awarded. The circumstance that *Kerr v. Dixon* was *trespass*, makes no difference. The rules of pleading are the same in both actions. A *justification* must be specially pleaded. In slander there are various justifications; as, that the words were true; or spoken in confidence; or in giving evidence on a trial, &c.

But if there be a fault in the pleadings, the plaintiff is equally guilty, because he assented to the plea, instead of demurring. The consequence was, that the defendant was deprived of evidence which he might have given.

Suppose there had been an issue; then the evidence of the defendant was improperly excluded. The Court proceeded on the ground, that to constitute perjury there must be proof of the *materiality* of the fact to which the party deposed; and that it was incumbent on the accuser to prove it. Perjury exists at the common law; and also under the statute of *Elizabeth*; and the enactment of the statute did not alter the common law.

Thus a person may be indicted on the statute, and found guilty at common law. (a) In 1 *Hawk.* 318. 323, 324. (b) the distinction of perjury of both kinds, is given; and it will be seen, that the *materiality* of the evidence, in prosecutions for perjury, at common law, constitutes no part of the offence. It is necessary to set forth and produce the record, in a trial for perjury, under the statute only. (c) In the present case, the plaintiff declared for a charge of perjury generally. The defendant was prepared to prove the truth as to perjury at common law; but the Court held him to such proof alone as is required for prosecutions under the statute.

(a) 1 *Hawk.*
(*Leach's* ed.)
324. citing 1
Sid. 274. *The*
King v. Drue.
(b) *Leach's*
edit.

(c) 1 *Hawk.*
331.

There were several sets of words charged in the declaration; some of which did not amount to perjury; and sure-

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(a) *Barnes's*
Notes, 478.
Jager v. Wil-
kins. Ibid.
480. *Smith v.*
Hazard.

ly it would be competent to the defendant to exhibit proof as to them, without producing the record ; on the same principle that in *England*, where there are several sets of words charged, some of which are not actionable, and entire damages are given, the judgment will be arrested. (a) But the plaintiff, in his own declaration, refers to the proceedings in *Rockingham Court*, which rendered it unnecessary for the defendant to produce them.

Wickham, for the appellee. The defendant in the Court below tendered an immaterial issue ; and now contends that he may avail himself of his own wrong. Nothing can be more contrary to law, or unsupported by principle. The distinction between the case of *Kerr v. Dixon* and this, is, that *there* the issue was found in *favour of the defendant*, who put in this general plea of "justification;" *here* it is found *against* him. *Kerr v. Dixon* is admitted to be law : but had the verdict been otherwise in that case, the decision of this Court would have been different. In *Baird & Co. v. Mattox*, (b) all the leading cases are collected by Mr. Call, in his argument, and fully support the position for which I contend. And in *Webster v. Bannister*, (c) it is said by *Buller, J.* that he could find no case of an exception to the rule, "never to grant a repleader, when the issue is found against the party tendering it." What is said by Judge FLEMING, in *Kerr v. Dixon*, as to there being *no issue* joined, must be understood to mean *no material* issue. How often do we find "covenants performed," "payment," &c. tendered as a plea; and in many cases the words, "to which plea the plaintiff replied generally," held to make up an issue. (d) But I hold it to be a settled point, that where judgment is given against a party tendering an immaterial issue, no repleader shall be awarded. This case is not influenced by the decision in *Taylor v. Huston*, (e) because that case turned entirely on the act of Assembly requiring special pleadings in a writ of right.

The bill of exceptions contained, *first*, the reasoning of counsel; and *secondly*, the judgment of the Court. It is

(b) 1 *Call*,
237.

(c) *Doug.*
295.

(d) 2 *Wash. 1.*
Walden's
Executor v.
Payer. Ibid.
51. *Torbet-*
tle v. Self.

(e) 2 *Hen.*
& Munf. 161.

only the objection of counsel, that the record ought to have been produced to shew the materiality of the evidence. But suppose the word *materiality* was the language of the Court; still the authorities will not bear Mr. *Wirt* out. In the definition of perjury at common law, (a) it is said, that the matter sworn to must be "of some consequence." This is surely a convertible term with *materiality*.

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(a) 1 Hawk.
c. 69. s. 1.

But it is said that the plaintiff in his own declaration referred to the proceedings in the County Court; and therefore it was unnecessary for the defendant to produce the record. It should, however, be recollected that the defendant held the affirmative of the issue, and that his plea of *justification* gave him as wide a range as the human mind can conceive. He was therefore bound to produce evidence to support his plea; and the best evidence the nature of the case will admit of, must always be had. The *particular* words spoken by the plaintiff in the Court of *Rockingham*, out of which the defendant said the perjury grew, are not stated in the declaration. The defendant comes forward to prove certain words spoken by the plaintiff, and certainly he must shew from the record whether they were material to the matter in issue. The declaration contains *one* charge of perjury throughout; there are not different sets of words; but even if there had been, still, under our act of Assembly, if any one count had been good, judgment could not be arrested. (b) Had there been a plea of *not guilty*, the affirmative, in issue, would have lain upon the plaintiff, and he must have produced the record.

(b) Rev.
Code, v. 1. c.
76. p. 112. s.
38.

Wednesday, March 29. The Judges delivered their opinions.

Judge TUCKER. This case, so far as the plea extends, is so precisely like the case of *Kerr v. Dixon*, that no distinction occurs to me, except that the one was an action of trespass, the other an action of slander. As a man might have several distinct grounds of justification in trespass, so may he in slander: as, that the words spoken

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were true ; that they were not spoken *maliciously* ; but in the course of a judicial trial, examination, &c. The plaintiff ought to be apprised by the plea, which of these justifications the defendant means to rely on ; otherwise he might be surprised at the trial, in this action, as well as in an action of trespass. The plea is therefore bad.

I should therefore be of opinion that the verdict ought to be set aside, and a repleader awarded, if the verdict had been for the *defendant*.

But here the verdict was for the *plaintiff*: the defendant ought not now to have advantage of his own ill pleading ; it being a rule that a repleader is not grantable in favour of the person who makes the first fault in pleading. (a)

(a) 2 *Saund.*
319. b. *Ben-*
net v. Holbech,
note (6).
Tidd's Prac.
K. B. (*Riley's*
edit.) 829,
830.

But I doubt whether upon this record *any issue* can be said to be joined : for the plea, if it had been formally and substantially pleaded, must have concluded with a verification, I presume ; in which case the replication might have *tendered* an issue ; but that would not have made up an issue without the defendant had replied and joined. On this point, therefore, I give no opinion.

On the point reserved by the bill of exceptions, I concur in the opinion formed by the other judges.

Judge ROANE. In this case the plea of the appellant was illegal and exceptionable in not stating the particular kind of justification he relied on ; and consequently injurious to the appellee, as it covered too much ground, and did not apprise him of any particular point to which the appellant meant to apply his evidence : yet the appellee closed therewith, and has obtained a verdict, and the appellant now comes to object to the judgment founded thereon. His complaint, when analyzed, is, that whereas he ought to have selected one particular point on which to meet his adversary, he has been permitted to take a wider range, and to pursue a course more beneficial to himself, and more injurious to his opponent than the law allows.

It is contrary to the uniform decisions in this Court to permit a party to object that for error which is for his own benefit, and has arisen from his own act. (a)

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The general rule on this subject is to grant a repleader wherever the issue is so immaterial as that the Court cannot know for whom to give judgment, whether for plaintiff or defendant: but in this case no such uncertainty exists. So far from it, the plaintiff has, by supererogation, put in issue and shewn that no possible ground of justification exists, on which the defendant can bar him of his action.

(a) See the cases of *Ham-
mitt v. Bul-
lett's Execu-
tors*, 1 Call,
567. and
*Smith v. Har-
munson*, 1
Wash. 6. and
others.

With respect to the other point; the charge is of a perjury, or taking a false oath which goes to the "loss of ears." Now, as the loss of ears is no part of the punishment of perjury at the common law, and is a part of the punishment under the stat. of 5 Eliz. (b) the charge is of a *statutory* perjury, and not of perjury merely at the common law. No difference can arise on this point, from the omission in our act of 1789, to continue to annex that punishment to this crime at the present day: the defendant was perhaps not aware of this change in the act; but certainly did not mean the offence as at common law, as is manifest from his speaking of the loss of ears.

(b) 4 Bl. Com.
138.

This charge, thus made by the plaintiff, and undertaken to be justified on the part of the defendant, cuts up by the roots a distinction taken by the appellant's counsel, that the materiality of the perjury in question was not necessary to be shewn, inasmuch as a man may be guilty of perjury at the common law in swearing to what is not material; and it was admitted by the same counsel that, in relation to a *statutory* perjury, the swearing must be shewn to be material. That cannot be shewn, unless after proving what the words sworn on that trial were, it be shewn by the *best* evidence (*the record*) how they applied to the matter in question. It would be dangerous to admit parol proof of the contents of an indictment, or declaration; and there is certainly no necessity for it. The Court therefore was correct in refusing leave to the Jury to hear a witness to prove what was sworn upon the trial in question, unless the party producing him had also

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exhibited, or offered to exhibit, a copy of the record containing the charge to which that evidence applied.

My opinion is that the judgment be affirmed.

Judge FLEMING. The general plea of "*justification*" is certainly ill, and could not have been sustained on demurrer. But there being a *general* replication to that plea, there was an issue, though an informal one ; and it is too late to take advantage of such informality, after verdict, especially by the party who committed the first fault in pleading. On the point mentioned in the bill of exceptions, all the Judges agree.

By the whole Court, judgment AFFIRMED.



Wednesday,
March 22.

Smith against Segar.

An action of debt will not lie against the acceptor of a bill of exchange.

THE appellant brought an action of *debt* against the appellee, in the County Court of *King and Queen*, for 980 dollars and 67 cents ; and declared that the defendant (now appellee) being indebted to a certain *John P. Saunderson*, in that sum, the said *Saunderson*, on the 6th of *November*, 1797, made his request in writing, directed to the defendant, requiring him to pay the amount to the plaintiff (now appellant) or order, at sixty days after date, which request being afterwards shewn and presented to the defendant, he, on the 11th of *December*, 1797, accepted, in writing, to pay the same. Plea, "*payment*," and issue.

At the trial the defendant tendered a bill of exceptions, stating that the plaintiff, to support his action, offered as evidence a writing, (which is referred to, and purports to be an inland bill of exchange,) without introducing any evidence to prove the hand-writing ; and also offered as evidence a letter, admitted by the defendant's counsel to be in

the hand-writing of the defendant ; (which is in like manner referred to, purporting to be an acceptance of a bill ;) whereupon the defendant, by his counsel, moved the court to prevent the said papers from going to the Jury as evidence ; but the motion was overruled ; and thereupon the bill of exceptions was sealed.

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The papers referred to in the bill of exceptions, are the following :

“ *Cobham, 6th Nov. 1797.*

“ At sixty days after date, please to pay Mr. *James Smith* or order, *nine hundred and eighty dollars, sixty-seven cents*, for value received, and much oblige, sir,

“ Your humble servant,

§ 980 67.

“ *John P. Saunderson.*

“ To Mr. *John Segar*, Merchant, *Dunkirk.*”

The following letter is the other paper referred to.

“ *Dunkirk, December 11th, 1797.*

“ Mr. *James Smith*,

“ Sir—Yours of the 22d ult. advising your holding Mr. *John P. Saunderson's* draft for *nine hundred and sixty dollars*, payable the sixth of next month, is to hand. I shall make a confidential and candid communication to you on the subject, in observing that I met with heavy losses last year, which has so deranged me, that I am fearful it will not be in my power to take it up ; at same time I make you the following propositions, one of which I hope you will, after advising with Mr. *Saunderson*, think proper to accept. I will either give you good bonds in suit for the amount, or, some time next month, send what goods I have on hand to vendue at *Norfolk*, and dispose of them for cash, and redeem the bill. I will thank you to write me by post, in course.

“ I am, Sir, yours respectfully,

“ *John Segar.*

“ Mr. *James Smith*, Cross Roads, *Surry County.*”

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

At the Term commencing in April, 1809.

IN THE THIRTY-THIRD YEAR OF THE COMMONWEALTH.

JUDGES, PETER LYONS,(1) ESQUIRE, *President.*
WILLIAM FLEMING, ESQUIRE.
SPENCER ROANE, ESQUIRE.
ST. GEORGE TUCKER, ESQUIRE.

ATTORNEY-GENERAL,

PHILIP NORBORNE NICHOLAS, ESQUIRE.

Tabb and others *against* Archer and others.
And
Randolph and others *against* Randolph and others.

THESE causes (which were appeals from decrees of the Superior Court of Chancery for the *Richmond* District, pronounced the 14th of *March*, 1804, dismissing the appellants' bills) originated in marriage-contracts, entered into by Doctor *Archer* and Doctor *Randolph*, on their respective marriages with the daughters of Mrs. *Tabb*. After marriage,

Marriage-articles are considered as the heads or minutes, only, of an agreement entered into between the parties, upon a valuable consideration, (the marriage,) and being in

(1) Judge Lyons was absent the whole of this term, having been prevented from attending, by indisposition.

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the wives joined their husbands (respectively) in conveyances of the several estates, (intended by the articles to be settled,) and transferred their whole interests to third persons, in order to have them reconveyed to their husbands. A bill was brought, in each case, by those entitled in remain-

their nature *executory*, ought to be construed and moulded, in equity, according to the intention of the parties at the time of concluding them.

The children born of the marriage, are *purchasers*, under both father and mother, by virtue of marriage-articles; yet upon the death of father and mother, they take (where the limitation is to the *issue* generally) as *coparceners per stirpes*, and not *per capita*. Marriage-articles are not to be rescinded, after the marriage, even by consent of the husband and wife, or by any conveyance which they, or either of them can make; but may be enforced in equity, at the suit of the *issue*, (whether *in esse*, or in *ventre sa mere*,) or of any other persons for whose benefit such articles were intended: the Court will either compel performance, (by appointing trustees where none were inserted in the articles, and decreeing a settlement,) or set aside any conveyance made with intent to defeat the rights of the *issue*, or of those in remainder, expectant on the estate for life of the husband and wife.

The intention of the parties to marriage-articles is to be collected from the nature of the agreement; the language and context thereof; the usage in similar cases; and the legal rights of the parties, as they existed before, and would have existed after the marriage, if no such articles had been made: but *parol* or other evidence, *dehors* the articles, to explain, or vary their meaning, ought not to be resorted to, unless there be some latent ambiguity which is otherwise impossible to be solved or explained, or unless something agreed on by the parties at the time, has been omitted, through fraud or accident.

An indorsement made on articles by the husband and wife subsequent to the marriage, can neither be regarded as a part of the original contract, nor as explanatory thereof.

The husband, on the marriage, being a *purchaser* for a valuable consideration, cannot be deprived of any of his legal rights, accruing by the marriage; except such as (according to a just and liberal construction of the articles) he must be understood and intended to have given up: if then there be any obsham in the articles, whereby the legal rights of the husband may, in certain events, interpose between the uses declared by them, a court of equity, in directing the settlement, ought to have regard to those legal rights, so as to preserve to the husband the enjoyment thereof, on the happening of such events. And the same construction ought to be made, in relation to the wife's legal rights, either accruing on the marriage, or existing antecedent thereto, and independent of it.

It having been agreed, by marriage-articles, that all the estate, real and personal, of the wife should remain in her right and possession during the marriage, and that the profits only should be applied to the support of the husband and wife, and their issue, if any; and it having been further agreed, that the husband would never sell or dispose of any part of the said estate, but that the same should always be held as an inviolable fund for the support of the said husband and wife and their issue, if any there should be; the first clause was construed as containing a declaration of the uses of the estate during the *coverture*, only; and the second clause as declaring the uses afterwards. The husband, therefore, as well as the wife, was adjudged to be entitled to the benefit of these uses for life.

Infants may contract by marriage-articles or settlements, and such contracts will bind them when of full age.

The law has entrusted the father or guardian with the marriage of infant children, or wards; and, consequently, settlements made by infants through the father or guardian are binding.

A recital in marriage-articles stating it to be the intention of the parties to settle all the real and personal estate of the wife, except as therein after excepted; and a part of such estate being omitted in a subsequent specification thereof, recourse may be had to the *excepting clause* to prevent the *universality* of the recital from being *restricted* (as it otherwise might be) by the *specification*.

In the construction of agreements the whole must be taken together.

der, under the articles, to set aside such conveyances, and for a strict settlement.

Few cases have occurred in which mere judicial proceedings have been clothed in such eloquent language as was displayed in the bills and answers in these causes. Much property was involved in the contest; men of great talents were interested; and it was one of those family dissensions which was well calculated to excite the passions and enlist the feelings of those concerned.

Previously to the marriage of Doctor *John Randolph Archer* with Miss *Frances Cook Tabb*, WHO WAS OF FULL AGE, and of Dr. *Bathurst Randolph* with Miss *Mary Tabb*, WHO WAS UNDER AGE, the mother of the young ladies insisted on a settlement of their estates, as the *ultimatum* upon which her consent to the marriage depended. Articles were accordingly entered into between the *intended* husbands and wives respectively, *without the intervention of trustees*. That between Doctor *Archer* and Miss *Frances Cook Tabb*, commenced with an agreement between the parties *reciting* that a marriage was intended to be shortly had and solemnized between them, and that they had mutually agreed that *all the estate* both real and personal, to which the said *Frances* was entitled should be secured to and settled upon her and her heirs, except certain property therein after excepted: in consideration of the said intended marriage, and for the intent and purpose aforesaid, the said *J. R. Archer* covenanted and agreed to and with the said *Frances* that all the aforesaid estate, both real and personal, *consisting of*, &c. [here several tracts of land and houses and lots are *particularly named*, which had been lately assigned to her, as one of the distributees of her late father's estate; *and *sundry stocks of horses, cattle, sheep and hogs, and other personal property, to which she is entitled as such distributee, but which had not then been assigned*; * are GENERALLY enumerated; also thirty-seven slaves for whose names reference is made to a schedule thereto annexed; *but out of that agreement are ex-*

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cepted two negroes by name, (though not included in the schedule) and a tract of land of 400 acres;] should remain in the right and possession of the said *Frances*, during the continuance of the said intended marriage: and the annual proceeds thereof *only* should be applied to the support and maintenance of the said *J.* and *F.* and their issue, if any there should be: and the said *J.* further covenanted and agreed with the said *F.* that he never would sell or dispose of any part of the said real or personal estate, except as therein before excepted; but that the same should always be held as an inviolable fund for the support and maintenance of the said *J.* and *F.* and their issue, if any there should be, of the said intended marriage; applying only the proceeds or profits thereof, without resorting to, or applying any of, the original stock for that purpose, but the whole of the said original stock, except as before excepted, should be inviolably held for the use and benefit of the said *F.* and her heirs, in the same manner as if the said intended marriage should never take effect: "by which expressions it is meant and "understood, between the parties, that if the said *J.* "should depart this life, leaving issue of the said marriage, "and the said *F.* should again intermarry, and leave issue, "that such issue should be equally entitled to the benefit of "this settlement as the issue of the said intended marriage "would be; and in the event of the death of the said "*F.* without issue, then the whole of the aforesaid estate "both real and personal, except as before excepted, should "go to her next legal representatives." Signed and sealed by *John R. Archer* and *Frances C. Tabb*, in presence of three witnesses.

The articles between *Dr. Randolph*, and *Miss Mary Tabb* were substantially the same as the preceding, except that they did not mention any property which had not been assigned to *Mrs. Randolph*, nor did they contain the latter clause (marked by inverted commas) which provides for the issue of the intended wife, by any *future marriage*, and also disposes of the estate in the event of the wife dying without issue.

In the case of *Dr. Archer*, the articles were executed on the 17th of *February*, 1801 ; those of *Dr. Randolph* had been previously executed, on the 19th of *November*, 1800. The respective marriages having taken effect, the following endorsement was made on both the articles : “ Memorandum, that at the time of executing the foregoing contract, “ it was understood between the parties thereto, that in the “ event of issue, by the said intended marriage, the said “ *John* [and *Bathurst* respectively] was to enjoy a life-estate in all the property herein mentioned to be settled and “ secured.” Witness our hands and seals the 26th of *February*, 1801. Signed and sealed by *John R. Archer* and *Frances C. Archer*, in the one case, and by *Bathurst Randolph* and *Mary Randolph* in the other ; and both dated on the same day.

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On the 20th of *April*, 1802, *John Randolph Archer* and *Frances Cook* his wife, by deed of bargain and sale, in consideration of *twenty thousand dollars*, conveyed the whole estate, real and personal, which had been allotted to *Mrs. Archer*, as one of the distributees of her deceased father's estate, to *Needler Robinson* ; to which deed the said *Robinson* also affixed his hand and seal. And on the 21st of *May*, 1802, *Bathurst Randolph* and *Mary* his wife, in consideration of *five shillings*, by a similar deed, conveyed the whole of her estate derived from her father, to *Richard E. Meade* ; who, on the next day, for a like consideration, re-conveyed it to *Bathurst Randolph*. To set aside these conveyances, was the object of the present bills ; which were brought, in the first mentioned case, by *Frances Tabb*, suing in her own right, and as next friend to the infant issue in ventre sa mere of *Archer and wife*, and also as next friend to five of her own children, infants, against the said *Archer and wife*, *Randolph and wife*, *William B. Giles*, (who intermarried with one of the daughters of *Mrs. Tabb*), and his wife, and the person to whom *Archer and wife* had made a conveyance of the estate : in the other case, by — *Randolph*, (the child of *Randolph and wife*), an infant of very tender age, by *Frances Tabb*, his next

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friend, and the said *Frances Tabb* suing as before, against *Randolph and wife*, and the same parties defendants, as in the first suit, substituting the purchaser in one case for that in the other.

*William B. Giles*, and *Martha* his wife, having released all their interest to *Mrs. Tabb*, and the infant children, their answers and depositions were relied on as evidence. Much parol testimony was introduced by the complainants in the Court of Chancery, tending to shew, (from all the circumstances, and the acts of the parties,) that the true construction of the *articles*, required a *settlement* of the estate upon the wives and their issue as *purchasers*, and in default of such issue, remainder to their blood relations, excluding the husbands even from a life-estate, in the event of their surviving their wives; and also that the articles were entered into with due deliberation, and without any kind of constraint. On the part of the defendants, *Archer* and *Randolph*, it was insisted that they were executed through the undue influence of *Mrs. Tabb*; and that her daughters reluctantly yielded to the terms of a proposed settlement as dictated by her. *Dr. Randolph* declares that "a few minutes before the marriage ceremony was performed, he was summoned to *Mrs. Tabb's* chamber, not to receive the hand of his bride, but to sign the marriage-contract, about the terms of which he had never been consulted." But the testimony going to prove the construction of the articles was disregarded by this Court: and it was thought to have been sufficiently established that the contracts were entered into freely.

The Chancellor dismissed the complainants' bills, and they appealed to this Court.

At the *October* term, 1808, these causes were very elaborately argued by *Call*, for the appellants, and by *Hay*, *Wickham* and *Randolph* for the appellees. In the course of the argument all the doctrine relating to marriage-articles and settlements, the interest which the issue and those in remainder acquired, the capacity of an infant to contract by marriage-articles, the effect of imposing restraints upon

marriage, and the power of a *feme covert* to dispose of her whole estate by giving her husband a conveyance, were fully discussed : but the Judges, in delivering their opinions, *seriatim*, as well as in the decree of the Court, having reviewed all the leading arguments and authorities, it would be productive of needless repetitions to insert the arguments at the bar.

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Thursday, April 20, 1809. The Judges pronounced their opinions, *seriatim*.

Judge TUCKER. This is an appeal from a decree of the Richmond Chancery Court, dismissing the bill of the appellants, who are, first, the issue of the marriage between the defendants, *Archer* and wife, formerly Miss *Tabb*; the mother of that lady; and her brothers and sisters, or a part of them; praying that the estate of the defendant, Mrs. *Archer*, may be settled pursuant to certain marriage-articles, entered into between herself and husband, previous to their marriage, under which the appellants claim an interest as *purchasers*, and for general relief.

These articles executed under the hand and seal of the parties, both of full age at the time, in contemplation of their intended marriage, having been proved by three witnesses, and admitted to record in the County Court of *Amelia*, where the parties, or one of them, resided; no question can be made as to that fact. But as a great deal was said in the argument, as to an undue influence exercised by Mrs. *Tabb*, over her daughter, to prevail upon her not to marry Dr. *Archer*, unless he consented to execute such articles; I shall only observe, that Mrs. *Tabb's* conduct, from the evidence, not only seems to me to stand above every possible imputation of impropriety, but to have been highly laudable and proper, and such as every prudent and affectionate parent, whether father or mother, would have done well to have pursued in such a case. Mrs. *Tabb* was guardian of her daughter by nature, and as such, the marriage of her daughter belonged to her, unless a testamentary guardian

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(a) 2 P.Wms.  
117. Eyre v.  
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had been appointed by the father, or the guardianship of the daughter had been duly committed to some other guardian.(a) But it appears from the record, that she was actually her daughter's guardian, whether by appointment by the father, or the Court, does not appear, and is perfectly immaterial. She was therefore in the strict line of her duty, when she was endeavouring to secure to her daughter, and her children the fortune committed to her care. That she refused her consent to the marriage after her daughter came of age, is perfectly immaterial ; it could not impede, or prevent the marriage. And the only penalty which it is alleged she proposed for disobedience, (though that is not proved, or rather is disproved,) was, that her daughter should not be married at her house, or that she would not speak to her again. Even if these things were proved, I hold them of no consequence. A mother has a right to withhold her consent to any connection with her daughter which she does not approve of ; and, whatever reasons or arguments she might use, if there were no improper motives or inducements held out on her part, they are not impeachable here. With respect to Dr. Archer, whatever were his motives for first objecting to, and then consenting to, and executing the articles, there can be no doubt of his *free agency* ; unless this Court should agree to set a precedent, for which I can find none, in any other place. The validity of the articles, therefore, I conceive, cannot be impeached ; the endorsement by Dr. Archer puts this matter out of all doubt as to *him*, being made *after* the marriage. That endorsement could not, however, operate any thing as to Mrs. Archer, who was no longer *sui juris*.

Articles made in consideration of, and previous to, marriage, are considered as heads of agreement entered into between the parties for a valuable consideration ; a provision for the issue of the marriage is one of the great and immediate objects of this agreement ; and consequently a principal intention of such agreement must be to secure such a settlement, as shall contain an effectual provision for that issue ; which end it is clear cannot be answered by a settle-

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(a) 1 *Eq. Cas.*  
390. *Trevor v.*  
*Trevor.* 1 *P.*  
*Wms.* 633. *S.*  
*C.* 1 *Fearne,*  
78, 79. 1  
*Fonb.* 202,  
203. n. (p). 2  
*Powell on Con-*  
*tracts,* 27. 3  
*Atk.* 610, 611.  
*Harvey v.*  
*Ashley.*

(b) 1 *P. Wms.*  
633, 634. 3  
*Atk.* 611.

ment so framed, as to leave it in the power of the parents to bar their issue by fine and recovery, or any other conveyance whatsoever. And the reason is, that the children of the marriage are considered as *purchasers.*(a) And therefore in articles on a marriage, to settle lands to A. for life, remainder to the heirs male of his body, by his wife, the articles being executory, and but as minutes, it has been decreed that the settlement should be made according to the intention, and consequently to the first son, &c. And the reason given is, that, if this construction upon marriage articles were not made, it would give way to fraud, and overreaching, and to the defeating of the manifest intention of the parties in settlements in which the *issue* of the marriage are considered as *purchasers.*(b) And marriage agreements are said to differ from all others in this; that the principal consideration is the marriage. Settlements are prudential acts done chiefly for this consideration: and the estate settled may be greater or less, according to the discretion of the parties: as soon as the marriage is had, the principal contract is *executed*, and *cannot be set aside or rescinded*; the *estate* and *capacities* of the parties are altered; the children born of the marriage are equally *purchasers*, under both *father and mother*: and therefore it has been truly said that marriage-contracts ought not to be rescinded, because it would affect the interest of *third* persons, the *ISSUE*. It seems also agreed that there is this further difference between agreements, on marriage being carried into execution, and other agreements, that all agreements besides are considered as entire, and if either of the parties fail in performance of the agreement *in part*, it cannot be decreed against the other *in specie*, but must be left to an action at *law*; but in marriage agreements it is otherwise: for though either the relations of the husband or wife, should fail in performance of their part, yet the *children* may *compel* a performance; they being considered as purchasers and entitled to all benefit of the uses under the settlement,



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(a) 3 Atk.  
187. 610, 611.

(b) 5 Atk.  
613.

(c) *Legg v. Gotwine, Cas. temp. Talbot, 20. 2 P. Wms. 349. West v. Erissey, 5 Ves. jun. 273-276. Randal v. Willis.*  
(d) *Trevor v. Trevor, 1 P. Wms. 631. Kentish v. Newman, 1 P. Wms. 234. Osgood v. Strode, 2 P. Wms. 257. Griffith v. Buckle, 2 Vernon, 13. Shelburne v. Inchiquin, 1 Bro. Ch. 358.*  
(e) 2 P. Wms. 244.

notwithstanding there has been a failure on one side. (a) And, although the rights of an infant, party to such an agreement, to *real* estate, may not, perhaps, be bound by any agreement in relation to it, *unless there be issue of the marriage*, (as there has been in this case,) yet, as to *personals*, her interest may be bound by agreement on the marriage; and if the parent or guardian cannot contract for the infant, so as to bind that property, the husband as to the personal estate, would be entitled to the absolute property in it, immediately on the marriage. (b) And Lord Ch. *Hardwicke* said, he knew of no precedent where a marriage agreement had been called in *question*, where it had been made (as in that case) with consent of parents and guardians: an observation which I make to save a repetition of what I have here said, in the cause which was heard at the same time with this. The force, obligation, and effect of marriage-articles is thus described by the Lord Chancellor in the case of *Randal v. Willis*, 5 *Ves. jun.* 273. "The marriage taking place upon these articles, and *no other written document* of the agreement between them, and the articles formally executed *under seal*, whatever the rights of the parties are by the articles, it is *totally impossible* that any parties thereto could be discharged from any one obligation imposed by the articles." Settlements varying from the articles have therefore been reformed or set aside. (c) And articles being in their nature *executory*, ought to be construed and moulded in equity, according to the intention of the parties. (d) And, in the case of agreements in consideration of marriage, a Court of Equity will totally disregard the *form*, if the *substance* of the agreement and intention of the parties in making it can be got at; as in *Cannel v. Buckle*, (e) where a woman gave a bond in 200*l.* penalty to her intended husband, in which the intended marriage was recited, and the condition was, that, if it took effect, she would convey all her lands to her husband and his heirs; and though it was objected that this bond became void on the intermarriage, the Lord Chancellor said it is sufficient that the bond is a *written evidence* of the agreement of the

parties, and being upon a *valuable* consideration, (*the marriage*.) it shall be executed in equity; and that it would be unreasonable that the intermarriage, upon which alone the bond was to take effect, should itself be a destruction of the bond. And the same point was before decided in the case of *Acton v. Acton*.(a)

The intent of the parties to an agreement may be evinced, either from the nature of the covenant compared with the substance of the agreement, or from the nature of the contract on which the covenant or agreement arises, considering who are the *parties* to it, and the object of their stipulating.(b) "The most apt instances of this sort, that occur, are in the cases of *marriage-articles*, wherein, although lands are *expressly covenanted* to be conveyed to one for *life*, with remainder to his heirs male of his body, which, on a *contract executed*, would give to the party an estate tail; yet, on a bill brought for the *execution of articles*, the lands will be directed to be settled upon *A.* for life, with remainder in *strict settlement*, upon his *first*, and *other sons* in tail male, &c. because, from the nature of the contract it is clear, that the *issue* of the marriage are *principally* in the consideration of the parties, and that the contract is made with a view to *secure to THEM* the estates stipulated about, and of which *they are PURCHASERS*, in *CONSIDERATION of the MARRIAGE*. It is considered, therefore, that it would be a strange and a vain construction of such contracts, if the *PRINCIPAL contracting*, and who is evidently the person *meant to be RESTRAINED* thereby, should be intended to have *such an estate* by them, as would *enable him THE very next day after their execution* to *DEFEAT*, by a fine, the *limitations to his ISSUE*, with a view to *secure which limitations the contract was entered into*, and a valuable consideration paid for it."

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(a) *Proc. in Chancery*,  
237. 2 *Vern.*  
480. S. C.  
1 *Eq. Ca.* 63.

(b) *Powell on Cont.* 40.

*Ibid.* 41. *Trevor v. Trevor*.  
1 *P. Wms.*  
v. *Seale. Ibid.*  
v. *Laughton*.

622. 1 *Eq. Cas. Abr.* 387. S. C. *Bale v. Coleman*. 1 *P. Wms.* 142. *Seale v. Griffith v. Buckley*. 2 *Vern.* 13. *Osgood v. Stode*. 2 *P. Wms.* 257. *Jones v. Laughton*. 1 *Eq. Cas.* 392. *Burton v. Hastings. Ibid.* 393.

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(a) 1 Lev.  
180. *Ibid.* 237.

(b) 1 Atk.  
265.

(c) 3 Atk.  
186.

Nor are the issue of the intended marriage the only persons to whom the consideration of the marriage extends. In the case of *Jenkins v. Remys*, (a) it was held that the marriage and marriage portion of the *first wife*, for whose issue by the intended marriage a provision was expressly made by a settlement, with remainder to the heirs of the body of the husband, did extend to the issue of the *husband* by a *second wife*. So in the case of *Newstead and others v. Searles and others*, (b) a widow on her marriage, with the participation and consent of her intended husband, made a settlement of her own estate, in favour of the issue of her former marriage, in fee, with a proviso, that, if there should be any issue of her intended marriage, they should have an equal share of her estate. There was no issue of the second marriage; and Lord *Hardwicke* declares that the issue of the *first* marriage stood in the very same plight and condition, as against a mortgagee having notice of this settlement, as the issue of the *second* marriage, if there had been any, would have done. So, in *Goring v. Nash and others*, (c) marriage-articles were entered into between a father and his son, on the son's marriage, wherein, after several limitations, there was a limitation in favour of one of the daughters of the father, (not the eldest,) whereupon it was objected that she was a mere volunteer, as not being the issue of the intended marriage, but only a daughter of the father. Lord *Hardwicke* said, all the decrees for the specific performance of marriage-articles, on limitations to *younger* children, were authorities in favour of the daughter of the father; and *where such articles* have been decreed *at all*, they have been carried into execution even as to COLLATERALS, and not carried into execution in PART ONLY. "Suppose," said he, "in the present case a bill had been brought by R. F. jun. (the son,) or the widow, *must not this particular limitation have been decreed to the plaintiff* (the daughter of the father) *at the same time?*" And he said nearly the same thing in the case of *Newstead v.*

*Searles.*(a) In the case of *Vernon v. Vernon*, which was a bill for the specific performance of marriage-articles, whereby lands of a certain value were agreed to be settled on the husband and wife, and the issue male of the marriage; remainder to the *brothers* of the husband, who were the plaintiffs. in which it was objected that the articles as to them were merely voluntary, and notwithstanding any of the *considerations* therein expressed, yet the Lord Chancellor decreed in their favour, and, upon an appeal to the House of Lords, that decree was affirmed.(b) The case of *Lechmere v. Carlisle*,(c) was, where a bill was brought by the nephew and heir of Lord *Lechmere*, deceased, to compel a specific performance of marriage-articles, whereby a certain sum of money was agreed to be laid out in lands, to be settled to the use of Lord *Lechmere* for life, without waste, with divers limitations over; remainder to Lord *Lechmere* in fee. The defendants, by their answer, insisted that Lord *Lechmere* intended only a provision for the *lady* and the *issue of the marriage*; and that the limitation of the remainder in fee to the right heirs of Lord *Lechmere*, ought not to be carried into execution in his nephew's favour, the articles as to him being merely *voluntary*. Sir *Joseph Jekyll*, Master of the Rolls, after taking a full view of all the various cases upon the subject, decreed in favour of the nephew;\* and his decree was, upon that point affirmed by Lord Ch. *Talbot*.(d) And the Lord Chancellor in delivering his opinion in that case observed, that "it was then a settled point, that where the "securities are appropriated, money agreed to be laid out "as land shall go as land, not only to the issue of the marriage, but likewise to a *collateral* heir, or *general remainderman*, unless there appears some variation in the par-

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(a) 1 *Atk.*  
268.

(b) 3 *P.Wms.*  
594.  
(c) 3 *P.Wms.*  
211.

(d) 3 *P.Wms.*  
238. *Cas.*  
*temp. Talbot*,  
80.

\* Note by Judge TUCKER. The following cases were mentioned and remarked upon by the Master of the Rolls in giving his opinion. 1 *Salk.* 154. 1 *Vern.* 298. *Kettleby v. Atwood.* *Ibid.* 471. S. C. 2 *Vern.* 101. *Lancy v. Fuirchild.* *Ibid.* 20. *Knights v. Atkins.* *Ibid.* 227. *Symons v. Rutter.* *Ibid.* 295. *Chichester v. Bickerstaff.* 1 *P. Wms.* 172. *Lingen v. Sowray.* 2 *P. Wms.* 171. *Edwards v. Countess Warwick.* 2 *Vern.* 322. *Holt v. Holt.* 2 *P. Wms.* 594. *Vernon v. Vernon.*

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(a) 2 P.Wms.  
175.

(b) *Hardres*,  
395.

(c) Cited 2  
P. Wms. 252.  
(d) 2 P.Wms.  
255.

(e) 2 P.Wms.  
257, 258.

(f) 3 Crui.  
Digest, 363.  
3 Atk. 646.  
S. C.

"ties' intent." *A fortiori* the land itself. For, as was said by Lord Ch. Macclesfield, in *Edwards v. the Countess of Warwick*, (a) the objection that the plaintiff claimed under a *voluntary* limitation did not hold, inasmuch as it had been held, that the CONSIDERATION for the PRECEDENT limitations in a marriage settlement, had been applied even to the SUBSEQUENT ones; as where, in consideration of a marriage and portion, land had been settled on the husband for life, and then to the wife for life, remainder to the children, with remainder to a brother; these considerations have extended to the brother, as was in fact afterwards done in the case of *Vernon v. Vernon*, before mentioned; so that, if that case required the support of a precedent, one might probably have been found. And this is agreeable to what Lord Hale is reported to have said in the case of *Jenkins v. Keami-h*, (b) that the consideration of the marriage, and the marriage portion, will run through all the estates raised by the settlement, though the marriage be not concerned in them, so as to make them good against purchasers, and to AVOID A VOLUNTARY CONVEYANCE; (c) and though Lord Macclesfield, in the case of *Osgood v. Strode*, (d) said, "the marriage and marriage portion supported only the limitation to the husband and wife, and their issue, which was all that could be presumed to have been stipulated for by the wife or her friends;" yet, it must be observed, that in that case, neither the wife, nor her issue, nor any of her friends were parties; but the contest was between a nephew, in whose favour there was a limitation in the articles, and the heirs at law of the father and son, by whom these articles were entered into on the son's marriage; and there was a decree in favour of the nephew, against the heirs at law. And the settlement was directed to be moulded in such manner as to provide for all the branches of the father's family, (from whom the estate settled moved,) according to the apparent intention of the father. (e)

In the case of *Le Neve v. Le Neve*, as taken from Mr. Forrester's MS, (f) where, by marriage-articles, the issue of that marriage were to have the estate in such manner as

*Edward Le Neve*, the father, should, by deed or will appoint; and no direction how the estate should go for want of appointment; but only, in default of issue, to *Edward* and his heirs; so that, if the plaintiff should die without issue in their father's life, their representatives would be entitled to nothing. Lord *H.* said, notwithstanding this, he thought the plaintiffs entitled to some relief, as the other part of that contingency might happen, and decreed a conveyance accordingly. This has satisfied the doubt in my mind, whether the collateral relations and mother of Mrs. *Archer* were entitled to ask for a settlement pursuant to the articles.

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And where it appears by the marriage-articles, that, in the settlement proposed to be made, the parties to the marriage are to take an estate for life, instead of an estate-tail, a FINE levied by the husband, (who was absolute owner of the premises in fee-simple, at the time of the marriage and entering into the articles, but was to have been tenant for life only, with remainder to the issue male of the marriage, and the heirs male of such issue male, lawfully begotten, with remainder to his own right heirs,) was considered as no bar to the eldest son of the marriage, although the uses of the fine were declared to be for the second and other sons of that marriage, and although the eldest son, as heir to his father, inherited other very large estates.(a)

(a) *Trevor v. Trevor*, 1 P. Wms. 622.

Length of time also appears to be no bar. In the last mentioned case, near fifty years had elapsed from the date of the articles, and upwards of twenty-five years from the date of the fine. It appeared that the articles had been thrown by for several years as useless, being found in the bottom of an old trunk after Sir *John Trevor's* death. But Lord Ch. *Parker* disregarded these circumstance, saying that if, within two years, (the time mentioned in the articles within which Sir *John Trevor* agreed to make the proposed settlement,) the wife's trustees had called for the settlement, or had brought a bill to compel the performance of the marriage-articles, there would be no question that the Court would have decided the settlement upon Sir *John Trevor*

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(a) 1 P.Wms.  
622. 1 Eq.  
Cas 387.  
(b) 3 P.Wms.  
213, 214.

for life, &c. according to the intention of the parties. (a) The same doctrine as that last mentioned, was held by the Master of the Rolls, in *Lechmere v. Lord Carlisle*, (b) viz. that Lord *Lechmere* was compelled in equity to fulfil the articles, and, having lived *after* the year within which time the lands were to have been purchased and settled, without doing it, he had *broken* his covenant; and the trustees might thereupon have brought their bill *immediately* to compel him to make such purchase and settlement. And although in common cases of a breach of covenant, the parties may be left to their action at law for damages, yet the power of a Court of Equity to carry marriage-articles into execution, notwithstanding a breach on either side, seems not to be doubted, for the specific execution of articles, being the most adequate justice in general, shall not be left to an action at law. (c)

(c) *Per Lord*  
*Ch. H. rdw.*  
3 *Atk.* 187.  
*Goring v.*  
*Nash.* *Ibid.*  
611. *Harvey*  
*v. Ashley,*  
*same doctrine.*

Marriage-articles being in their nature *executory* only, it has been determined that a covenant therein contained to stand and be seised of the premises, until such time as a further assurance should be thereof made to the uses of the said articles, could not be taken as a final settlement. (d)

(d) 1 P.Wms.  
632.

This view of the principles by which Courts of Equity are governed, in respect to marriage-articles, may furnish us with a guide to the decision of the case before us.

The marriage-articles, to which Dr. *Archer* and his present wife are the only parties, recite "that, whereas a marriage is intended to be shortly had and solemnized between the parties thereto, and they have mutually agreed that ALL the estate, both real and personal, to which the said *Frances* is entitled, SHALL be secured to, and settled upon her and her heirs, except as therein after excepted. Now, in consideration of the said intended marriage, and for the intent and purpose aforesaid, the said *J.* doth thereby covenant and agree to and with the said *Frances*, that ALL the aforesaid estate, both real and personal, (consisting of sundry plantations, slaves, stocks of horses, cattle, &c. except as therein excepted,) shall remain in the right and possession of the said *Frances*, during the

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“ *continuance* of the said intended marriage ; and the an-  
“ nual proceeds thereof, ONLY, shall be applied to the sup-  
“ port and maintenance of the said *J. and F.* and their *is-*  
“ *sue*, if any there should be. 2dly. The said *John* doth  
“ thereby FURTHER covenant and agree to and with the  
“ said *Frances*, that he never will sell or dispose of any  
“ part of the said *real* or *personal* estate, (except as before  
“ excepted,) in any manner whatsoever : But the same  
“ shall always be held as an INVIOABLE FUND for the sup-  
“ port and maintenance of the said *John* and *Frances*, and  
“ their *issue*, if any there should be of the said intended  
“ marriage, applying only the proceeds, or profits, without  
“ renting or applying any of the original stock for that pur-  
“ pose : But the whole of the said *original stock* (except as  
“ therein excepted) shall be INVIOABLY HELD, for the use  
“ and benefit of the said *Frances* and her *heirs*, in the same  
“ manner as if the said intended marriage should never take  
“ effect. By which expression it is MEANT and UNDER-  
“ STOOD between the parties, that if the said *John* should  
“ depart this life, leaving *issue* of the said marriage, and the  
“ said *Frances* should again intermarry and leave *issue*,  
“ SUCH *ISSUE* shall be equally entitled to the benefit of this  
“ settlement, as the *issue* of the said intended marriage  
“ would be ; and, in the event of the death of the said *Fran-*  
“ *ces*, without *issue*, then the whole of the aforesaid estate,  
“ both real and personal, (except as before excepted,) shall  
“ go to her next legal representatives.” On the back there  
is an endorsement, of which I shall take notice presently.

It was objected to this instrument, that, if it were any thing, it was a marriage SETTLEMENT, and not merely *articles* ; that it was therefore an agreement already EXECUTED between the parties, and not merely *executory*, as articles are ; that being already *executed*, it must be left to its legal operation and construction ; that the Court could not interfere to direct any other settlement, since that would, in effect, be to change the agreement between the parties. To these objections an answer perfectly satisfactory was given



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(a) 3 P. W. 122.  
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by the counsel for the appellants ; that there is no covenant, or *grant*, or any words capable of *passing* an interest, or of declaring that she will stand seised to the uses in the instrument mentioned, or of creating a use, or trust, *on the part of Mrs. Archer*. The covenants are entirely on the part of the husband ; and whether the object of these covenants be *executory* or not, yet, as it appears that the husband has *actually broken* his covenant, by executing a *voluntary conveyance* for the land, and taking back a conveyance to himself, in exclusion of the *wife* and her issue, (to provide for whom, whether of that or any future marriage, was manifestly the object and intention of the articles,) that objection ought not to prevail. And the case of *Lechmere v. Carlisle*(a) is a strong authority to shew, that, whenever there is a *breach* of any covenant contained in marriage-articles, a Court of Equity will interpose its aid, to enforce a settlement to be made pursuant to the intention of the parties, as it may appear from the articles ; provided the application for the aid of the Court be made in behalf of such persons, whose interest, whether immediate or remote, was within the consideration of the marriage, as in the case of the issue of Doctor *Archer* and his wife, now before us, who, in my opinion, are well entitled to have such a settlement made, as was manifestly the intent and meaning of the parties, as expressed in, or as may be collected from, the articles themselves.

The counsel for both parties have contended, on their respective parts, for an exposition and interpretation of the articles, by evidence *dehors* the articles themselves. The counsel for the appellants rely on Mr. *Giles's* deposition, and some further evidence, altogether parol ; their adversaries claim the benefit of the endorsement, made by Dr. *Archer* and his lady, upon the articles, some time after the marriage. I am of opinion, that *both* ought to be rejected, in the present case. The only effect of that endorsement, I conceive, is to prove, (if such proof were wanting,) that there was no fraud or surprise upon Dr. *Archer* in the original execution of these articles. With respect to Mrs.

*Archer*, they could have no effect ; she was no longer *sui juris* ; no longer capable of *contracting with*, or of *explaining* a contract *made with*, her husband ; being equally incapable of being a *witness* for or against her husband, as of *contracting with him*. The endorsement, to have any operation with regard to her, must operate in one or other of these modes. With respect to parol testimony, I can discover no such ambiguity in these articles as to require or permit a resort to it. I have, on a former occasion, expressed my reasons pretty much at large for rejecting parol testimony to explain the meaning and intention of parties in a solemn covenant, or even in written agreements. (a) I will not repeat them, though I still feel their full force ; and conceiving that the articles themselves are sufficiently intelligible, as containing words which have, in themselves, a positive, precise sense, I have no idea of its being possible to change them : and shall add, upon the authority of Lord *Thurlow*, that I take it to be an established rule, that words cannot be changed in that manner. (b)

From the various cases upon the subject of marriage-articles, I think one general rule may be collected, which I do not recollect to have found precisely laid down, in any one. It is this : that, whenever in marriage-articles a settlement is proposed to be made, if there be any *casus omissus* or chasm in the uses, or estate intended to be settled, such *casus omissus* or chasm shall be supplied by the Court according to the intention of the parties, if possible to be collected from the instrument ; if not, then from the *rules of law*, or the usages customary in such settlements. Thus, where the uses expressed in the articles have gone *no further* than to limit an estate-tail to the issue of the owner of the estate, it was held that the equitable reversion in fee descended upon the heirs general of the grantor ; and it would seem that a settlement was directed accordingly. (c) So where money, part of which was the husband's, and part the wife's, was on the marriage agreed to be laid out in land, and settled on the husband for life, remainder to the wife for life,

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(a) *Long v. Colston*, 1 *Hen. & Muntf.* 181.

(b) 1 *Bro. Ch. Rep.* 350, 351. See also 4 *Bro. Ch.* 244, 245. &c.

(c) *Goring v. Nash*, 3 *Att.* 186.

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(a) 2 Fern 20,  
21. *Knights v.*  
*Atkins.*

(b) 3 P.Wms.  
217, 218.

(c) 1 P.Wms.  
633. *Trevor v.*  
*Trevor.*

remainder to the heirs of their two bodies ; and the ~~use~~  
*went no further* ; it was decreed that the heir of the hus-  
band should have the whole (notwithstanding the wife sur-  
vived him) after the wife's death, upon the presumption  
that it was so intended.(a) And this decree was cited and  
approved by the Master of the Rolls, in *Lechmere v. Car-*  
*lisle.*(b) So, where articles on a marriage were to settle  
lands to A. for life, remainder to the heirs male of his  
body by his wife, the articles being *executory*, and but as  
*minutes*, the settlement should be according to the intention  
and usual course in such cases, and consequently to the first  
son, &c. in strict settlement.(c)

Now the husband upon the marriage is a purchaser for  
a *valuable consideration*, and shall not be deprived of any of  
his *legal rights*, accruing upon the marriage, except such as  
he shall have expressly covenanted, or consented, to give up,  
by the articles concluded between him and his intended wife.  
In decreeing a settlement, therefore, to be made pursuant to  
these articles, the Court ought to inquire how far he has  
given his consent to this deprivation ; beyond which this  
Court cannot go. Therefore if there be in the articles  
any contingency unprovided for, in the happening of which  
his *legal rights*, *jure mariti*, may take place without preju-  
dice to the general scope and intention of the articles, and  
to the interests of those who are within the consideration of  
them, the settlement to be made, in case of such contin-  
gency happening, ought, I conceive, to pursue the rules of  
law, so as to let him into the perception and enjoyment of  
those legal rights. And the same construction ought to be  
made in favour of the wife's rights, accruing on the mar-  
riage: each party retaining in their fullest extent their  
respective rights accruing upon the marriage, which they  
have not, on a fair and liberal interpretation of the articles,  
according to the established rules of construing them in  
Courts of Equity, surrendered for the mutual benefit of  
themselves, and their issue, or of such other persons as are  
evidently within the consideration of the agreement. I wish  
to be understood as confining my observations to the com-

struction of marriage-articles, not as meaning to extend them to *settlements*, or any other agreements *executed*.

The articles contain two distinct covenants. The first relates, exclusively, to the *continuance of the marriage*; during which period the rents and profits *only*, are to be applied to the support and maintenance of the husband and wife, and their issue, if any. By the second, Dr. *Archer* covenants that he *never* will sell any part of the estate ; (except as in the articles mentioned ; ) thereby divesting himself, completely, of all power of disposing of the same ; (as in violation of that covenant he has done ; ) but that the same shall *always* be held as an INVIOABLE FUND for the support and maintenance of the said JOHN and Frances, and their issue, if any ; only applying the proceeds or profits thereof, without resorting to, or applying, the original stock, &c.

Now the first covenant applying to the *continuance of the marriage* ; this part of the articles may fairly be interpreted to relate to some *future* period, so far as relates to the application of the proceeds or profits of the estate ; the support and maintenance of the husband is evidently contemplated therein, as well as that of the wife and their issue : and the original fund is to be held INVIOABLY for ALL those purposes. The provision for the husband is not limited to the continuance of the marriage, any more than the provision for the wife, or the children ; it must therefore be for life at least ; subject, however, to the claims of the issue for a proper support and maintenance, if it should be withheld. The meaning then is, that Dr. *Archer*, in consideration of the marriage, and of the property left at his disposal by the articles, renounces his matrimonial rights to the rest of the estate of his intended wife ; and, in lieu thereof, covenants and agrees to accept of the proceeds and profits thereof, *only*, for the support and maintenance of himself and family during the continuance of the marriage, and for the like support and maintenance of himself and the issue of that marriage in the event of his surviving his wife.

But if I am mistaken in this construction of the second covenant, and it should be that it relates only to a support

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and maintenance for Dr. *Archer*, during the continuance of the marriage, then, I must observe that there is no provision made for the event of Dr. *Archer's* surviving his wife, and therefore as there is issue of the marriage, Dr. *Archer* will at all events be entitled to be tenant by the *curtesy* of the lands, there being no covenant or agreement to surrender that *legal* right. But, under the fairest construction of the articles, I think he has agreed to accept the profits for life, of the *whole* estate, in lieu of the chance, only, of being a tenant by curtesy in the *real* estate.

The latter part of the second covenant, "that the original stock shall be inviolably held for the use and benefit of the said *Frances* and her heirs, in the same manner as if the said intended marriage should never take effect," may seem to give room for a different interpretation of the preceding member of the covenant, were it not that the meaning of that expression is immediately explained, so as to leave ample room for the construction I conceive it ought to have; or if not, to leave room for the interpretation of the tenancy by the curtesy in the lands, which is nowhere covenanted to be surrendered, or given up, although it may be merged in the life-estate, which, according to my interpretation of the articles, Dr. *Archer* is entitled to. (a)

(a) *Vide Hod-*  
*den v. Lloyd,*  
*2 Bro. Ch. 543.*  
where arti-  
cles some-  
what like  
these were en-  
tered into.

My opinion therefore is, that the Chancellor's decree dismissing the bill of the plaintiffs ought to be reversed; that the defendants, Dr. *Archer* and his lady, ought to be decreed to execute a settlement of her estate (except as excepted in the articles) to trustees, to be named by the Court, in fee-simple, in trust to permit Dr. *Archer*, during the continuance of the marriage, to take and receive the rents, issues, and profits thereof, for the support and maintenance of himself, and his wife, and their issue, if any, and, from and after the determination of the marriage union, to permit the survivor of the said *John* and *Frances* to take and receive the rents and profits, in like manner, during his or her life, for the like purposes; and, from and after the death of the survivor, to hold the same to the use of the issue of the said *Frances*, and the descendants of such

issue, if any there be, in equal portions, *per stirpes*, and not *per capita*: and, in case of the death of the said *Frances*, without issue of her body, and without any descendants, then and in that case, to the use of the heirs of the said *Frances*, who shall be then living, generally, in such portions as the law directs; subject, nevertheless, to the right of *Dr. Archer* to take and receive the rents, issues, and profits thereof, in case he shall survive his wife: that the several deeds and conveyances executed by *Dr. Archer* and wife, for the lands and slaves, &c. and the several deeds and conveyances executed by the persons to whom those deeds and conveyances first mentioned were made, be brought into the Court of Chancery, and there cancelled; and that the Court of Chancery take such further order, as to the records made of the proof of the said deeds and the recording thereof in the District Court of *Petersburg*, and in the County Court of —, as in the opinion of that Court will best answer the purposes of preventing fraud and imposition in consequence of the proving and recording those deeds.

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Judge ROANE. As the case of *Randolph v. Randolph* and others, not only embraces, perhaps, all the important topics on which the case of *Tabb v. Archer* and others turns, but also involves some important points *ultra*, I will first give my opinion on it: a few words will then suffice to declare my opinion on the other case.

I shall throw out of this case all the parol testimony going to explain the contract in question. Where there is a written agreement, the whole sense of the contracting parties is supposed to be comprised therein; and it would be dangerous to make any addition thereto, unless there was fraud in leaving out something at the time; (a) or unless there be a latent ambiguity which is impossible to be explained without the aid of parol testimony. The last is not pretended to exist in this case; and as to the first, it is not shewn that any other terms than those comprised in the written contract were stated to, or assented to, by *Dr. Randolph*: if any thing intended by *Mrs. Tabb* has not

(a) 1 *Fenb.*  
188. and 2  
Call, 5. *Flemings v. Wil-*  
*lie.*

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been inserted in this agreement, it is exclusively her own act, or that of her agent; and cannot affect the interest of Dr. *Randolph*. The construction of the *contract* must therefore depend exclusively upon the terms of the instrument itself.

Before I come particularly to the construction of the contract, I will dispatch some preliminary objections.

In the first place, it is objected that Mrs. *Randolph* was an infant at the time of executing the agreement, which, therefore, shall not bind her. The answer is, that infants may marry, and as essential thereto, may contract by means of marriage settlements. In the case of *Harvey v. Aston*, (a) this position is established; and a settlement by an infant *feme* of 15, was held to be irrevocable in favour of the issue, and that the infant had not her election to waive the agreement at the age of 21. The same doctrine is expressly held in the case of *Seamer v. Bingham*. (b)

(a) 3 Atk.  
575.

(b) 3 Atk. 54.

Again, it is objected that the agreement in question was no act of the infant, Mrs. *Randolph*, but exclusively the act of her mother. The answer is, that the law has entrusted the father, or guardian, with the marriage of infant children, or wards, who ought not to do it to their disparagement; and, consequently, that settlements made by infants through them are binding; and it is further held that, even where the father or guardian acts *corruptly or fraudulently*, the agreement is not therefore to be set aside, and the children stript of the provision intended. (c) In the case before us there is, on the contrary, no pretence to say that the motives of the mother were interested, (however unusual such a course of conduct may be in this country,) or that she made any gain to herself by the contract in question. The settlement before us has no limitation in favour of herself or others of the *Tabb* family; as is the case in the cause of *Tabb v. Archer*.

(c) 3 Atk.  
611.

As to the consent to this instrument on the part of Dr. *Randolph* and his wife, it is proved that they executed it freely; and it is probable, upon the testimony, that they

knew from an early stage of the courtship, that a settlement would be insisted on by Mrs. *Tabb*.

With respect to the settlement itself; it is held that in the case of articles before marriage, the provision for the issue being the immediate object of the agreement, Courts of Equity will execute them in strict settlement, so as to bar the power of the parents to defeat them by fine and recovery; (a) and that, although the articles, by *legal construction*, would give an estate of inheritance to the husband or wife, yet they will be executed in strict settlement in favour of the issue on the ground assigned. (b) To these positions I will add this; that the support of the husband and wife being equally objects of the marriage, to which the property belonging to each is naturally contributory, the rights of either thereto, accruing by the marriage, will only be lost by an express renunciation thereof, or by a renunciation arising from a plain and necessary implication; and that, as such a renunciation without consideration is unreasonable, we ought to lean in favour of a construction giving an equivalent. I have not found nor looked for any authorities on this point; but I hold it to be self-evident.

The case before us is a strong one for the application of this principle; for, unless the husband gets a life-interest in the property, he gets almost nothing, although he married a lady with a large fortune. Let us see whether there be any thing in the agreement which imports an absolute renunciation; or rather, whether the renunciation of his marital rights is not in consideration of a life-interest in the whole estate, exclusively of the excepted property. It is of no avail to say that this construction, letting in the life-interest of the husband, postpones the vesting, or, rather, the enjoyment, of the limitation, in favour of the issue; that is but the common case, and such a provision for the husband, in general very just, is found in almost every settlement of the kind.

The agreement before us states its object, intent and purpose to be, to "secure and settle" upon the wife and her "heirs," (construed to mean "*issue*" in order to further the intention of the agreement,) all her estate, except a

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(a) *Fearnes*,  
78.

(b) 2 *Bridg*  
*Dig.* 9.



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*pittance* particularly specified and excepted. The first remark I make on this part of the agreement is that this declared object is answered, although the husband is also let in to the enjoyment of a life-interest: for the covenant not to aliene, &c. secures the estate to the wife for her life, and the articles also settle the property upon, and vest it in, the issue, although the husband is construed also to have a life-interest: by this construction the estate is "secured" to the wife and "settled" on the issue in the language of the articles, although in the last case it may not be so soon enjoyed by them as if the life-estate of the husband should not intervene and had been expressly given up and excluded.

In furtherance of this declared object and intention, it is covenanted that the property aforesaid shall "remain in the right and possession of said *Mary* during the continuance of said intended marriage," and the proceeds only be annually applied to the support of the said *Bathurst* and *Mary*, and their issue, if any be. The covenant thus far relates only to the continuance of the coverture. Dr. *Randolph* then goes on further to stipulate, that "HE NEVER WILL sell or dispose of any part" of the estate in question in any manner whatever, but that the whole thereof, shall be ALWAYS held as an inviolable fund for the maintenance of said *Bathurst* and *Mary*, and their issue, if any there should be, applying only the profits or proceeds thereof to that purpose, without resorting to or selling any of the original stock, for that purpose, which shall be held for the use and benefit of the said *Mary* and her heirs, "in the same manner as if said intended marriage should never take effect."

The first stipulation above mentioned relates only to the rights of the parties during the continuance of the intended marriage. Every purpose in relation thereto would seem to be answered by the stipulation that the property should remain in the RIGHT AND POSSESSION of the wife, during the marriage, and the proceeds only be applied to support the issue: after this it would perhaps be supererogation to stipulate that the husband would not sell the same during

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*the coverture.* We must therefore to satisfy this last stipulation, apply it to events posterior to the coverture ; to the rights of the husband in the event of his surviving his wife. In this relation it is, that Dr. *Randolph* stipulates that he will "NEVER" sell or dispose of the property in question ; (not that he will not do it during the coverture ; ) he also stipulates that it shall ALWAYS be held as an inviolable fund for the support of himself and wife, (not that it shall be so held only during the coverture,) and their issue, if any ; applying the profits only as aforesaid. While these words are fully extensive enough to confer on Dr. *Randolph* the use of the property for his life, for the covenant is not restricted to the duration of the coverture ; they also guaranty to the issue of the marriage a support therefrom even after the death of his wife, and thus answer every equitable purpose in their favour. The concluding stipulation that the original stock shall be inviolably held for the "use and benefit of *Mary* and her heirs in the same manner as "if said intended marriage should never take effect," while it cannot be taken LITERALLY, for then the object of the settlement in favour of the issue of the marriage would be *defeated*, must be satisfied by a construction giving to the husband the use of the property for life in the event of his surviving, while his power of alienation being given up, the estate will *ultimately* remain to the wife and to her issue after his death. We must restrain the meaning of these last mentioned words in this manner, in order to effectuate the clear intention of the parties, to settle the estate in favour of the issue of the marriage, and reconcile it to the life-estate given to the husband in consideration of his marital rights as aforesaid.

I am thus inclined to think that, upon a fair view of the whole instrument, and especially, when we take into consideration the general principle before mentioned, that the enjoyment of the property of a husband or wife by the other, as the case may be, for life at least, is always intend-

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ed in settlements of this kind ; the right of Dr. *Randolph* in the case before us to the use of the property for his life is recognised and admitted by the articles.

Such is my construction of the agreement in question. I therefore think the decree ought to be reversed ; and one rendered calculated to settle the estate in controversy pursuant to the uses embraced by that construction.

Most of the grounds of my opinion in the case of *Randolph v. Randolph* and others, apply also to the case of *Tabb v. Archer*. The circumstances of this case are stronger against the claim of the appellees than those in *Randolph's* case. For example ; Mrs. *Archer* was of full age at the time of the contract ; and therefore Mrs. *Tabb's* consent was not essential to the marriage. The marriage might have been had without it : but indeed, Mrs. *Archer* herself required a settlement as a *sine qua non* of the marriage. Dr. *Archer* was also duly notified of this requisition, and on deliberation, acceded thereto.

As to the construction of the agreement there is no difference between this case and the other, except that it provides for the issue of any FUTURE marriage of Mrs. *Archer*, and in default of any issue by her, provides also for the next legal representatives of Mrs. *Archer* ; whereas, in *Randolph's* case, the issue of the contemplated marriage only was provided for. This general limitation in favour of the *Tabb* family might by possibility extend to Mrs. *Tabb* herself : but this possibility is too remote to fix on her any selfish or interested conduct which can in any degree affect the validity of the transaction. I should be of this opinion even if the contract had been negotiated by her : but this is not the case ; it was the act of Mrs. *Archer* ; and if any benefit results to Mrs. *Tabb* thereby, it is conferred by her daughter, and not by her own act. My opinion is, that the decree in this case is to be similar to that in the case of *Randolph v. Randolph* and others, except that it is to take in all the issue, by any marriage, of the appellee, Mrs. *Archer*.

Judge FLEMING. The case has been so fully and ably discussed by the Judges who have preceded me, that I shall only add that I concur with them in opinion, and unite in the decree which has been agreed upon in conference.

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The following were the decrees entered in both cases, changing only the names of the parties. Those parts included within crotchets, thus, [] were inserted in the case of *Tabb* and others v. *Archer* and others, and omitted in that of *Randolph* and others v. *Randolph* and others. The additional matter to be found in the decree in the last mentioned case, is noted at the bottom of the page.

"The Court is of opinion that the issue of the said *Frances Cook Archer*, [either] born of her marriage with the said *John Randolph Archer*, [or any future marriage,] whenever they may come *in esse*, are in equity to be considered as *purchasers*, and within the consideration of the articles agreed upon and executed between the said [*John Randolph Archer* and *Frances*] his wife, then [*Frances Tabb*], previous to their intermarriage; to which articles,* [both parties being of full age at the time of the execution thereof,] no objection is perceived either on the ground of fraud or surprise; nor are the same liable to be impeached for any other reason. Marriage-articles are considered as the heads or minutes, only, of an agreement entered into between the parties, upon a valuable consideration, the marriage; and, being in their nature executory, ought to be construed and moulded in equity according to the intention of the parties at the time of concluding the same. As soon as the marriage takes place, the *principal* contract is executed, and cannot be set aside, or rescinded, the

* Additional matter in the decree of *Randolph* and others v. *Randolph* and others.

Instead of the words, included within crotchets, at this mark * insert, "although the said *Mary Randolph*, then *Mary Tabb*, one of the parties thereto, was an infant at the time, yet being made by her with the privity, approbation and procurement of her mother and guardian, and being, moreover, beneficial to the said infant and her issue."

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“ *estate and capacities* of the parties being altered, and the
 “ children born of the marriage equally purchasers under
 “ both father and mother : wherefore it has been truly said,
 “ that marriage-contracts ought not to be rescinded, be-
 “ cause it is impossible to reinstate the parties in their original
 “ condition, and because it would affect the interest of *third*
 “ persons, the *issue* ; who, whenever they come *in esse*, or
 “ are even in *ventre sa mere*, are entitled to the aid of a
 “ Court of Equity to compel a performance, or to set aside
 “ an act done with intent to defeat their rights, which it was
 “ the object and intention of the articles to secure : which
 “ intention can never be answered if the parents are at liber-
 “ ty to dispose of the property agreed to be settled, on
 “ the marriage, so as to bar their issue by fine and recovery,
 “ or any other conveyance whatsoever. Whatever effect a
 “ conveyance by husband and wife may have upon the in-
 “ terest of the wife alone, as intended to be secured by
 “ marriage-articles, (concerning which it is now unnecessary
 “ to decide,) the interest of the *issue*, when intended to be
 “ provided for by the articles, cannot be affected thereby ;
 “ it being impossible for the parties to the contract to be
 “ discharged from any one obligation imposed by the arti-
 “ cles. For it would be a strange and vain construction of
 “ marriage-articles, if the principal party contracting, and
 “ who is evidently the person meant to be restrained there-
 “ by, should be intended to have such an estate by them, as
 “ would enable him the very next day to defeat the limita-
 “ tions to his issue, with a view to secure which the con-
 “ tract was entered into, and a valuable consideration paid
 “ for it. And, although this, perhaps, might have been
 “ one of those cases, where the articles alone, if the parties
 “ thereto had not attempted to defeat them, might have
 “ been sufficient to answer the purposes intended, without
 “ any settlement to be made pursuant thereto ; yet the de-
 “ fendants in the present case, having done all that lay in
 “ their power to defeat the articles, the *issue* of the mar-
 “ riage and all others within the contemplation of the
 “ articles, are entitled to the aid of a Court of Equity, to

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“ prevent that design from taking effect, by setting aside all
“ the conveyances made *by*, or *to*, the defendants for that
“ purpose ; and by appointing trustees, and decreeing a
“ settlement to be made, pursuant to the articles, and to
“ the intention of the parties, at the time of the contract ;
“ as the same may be collected from the nature of the agree-
“ ment ; the language and context thereof ; the ordinary
“ usage in similar cases ; and the legal rights of the
“ parties as they existed before, and would have existed
“ after, the marriage, if no contract or agreement had
“ been made between them, without resorting to *parol*, or
“ other evidence *dehors* the articles to explain or vary the
“ meaning thereof, unless there be some latent ambiguity
“ therein, which is otherwise impossible to be solved or ex-
“ plained, or unless something agreed on by the parties at
“ the time, has been omitted to be inserted therein,
“ through fraud or accident, as in the case of *Flemings v.*
“ *Willis*. 2 Call, 5. The endorsement made on the arti-
“ cles by the parties thereto, subsequent to the marriage,
“ can neither be regarded as a part of the original contract,
“ nor as an explanation thereof. The wife, *after* the mar-
“ riage took effect, being no longer *sui juris*, or capable of
“ making any contract with her husband, (but through the
“ intervention of the trustees, which is not the case at pre-
“ sent,) nor capable of giving evidence in his behalf. The
“ evidence of Mr. *Giles*, who drew the articles, is consi-
“ dered as inadmissible for the purpose of explaining them,
“ because it is conceived that the words of the articles, if
“ the preceding rules for construing them be adopted, are
“ too strong to admit of his construction, without contra-
“ dicting, rather than explaining, them. The husband on
“ the marriage being a *purchaser* for a valuable considera-
“ tion, cannot be deprived of any of his *legal* rights accru-
“ ing *by* the marriage, except such as (according to a just
“ and liberal construction of the articles) he must be under-
“ stood, and intended, to have *given up*, for the purpose of
“ securing that provision for the wife and her *issue*, or other
“ persons manifestly within the consideration of the articles,

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“ who are intended to take as *purchasers under them*, which
 “ was the sole object of such an agreement ; if, then, there
 “ be any chasm in the articles, whereby the legal rights of
 “ the husband, may, in certain events, INTERPOSE *between*
 “ the uses declared by the articles, a Court of Equity, in
 “ directing the settlement which is to be made, ought to
 “ have regard to those *legal rights*, so far as to preserve to
 “ the husband the enjoyment of them, in case of such
 “ events. And the same construction ought to be made
 “ in behalf of the wife’s *legal rights*, accruing also on the
 “ marriage, or existing antecedent thereto, and independent
 “ of it. For these reasons, this Court is of opinion, that the
 “ Court of Chancery erred in dismissing the bill with costs ;
 “ therefore the said decree is reversed, &c. And this Court
 “ proceeding to pronounce such decree, as the said Super-
 “ rior Court ought to have made, is further of opinion,
 “ that the covenant contained in the articles, (whereby it is
 “ agreed, that all the estate, real and personal, of the said
 “ *Frances*, shall remain in the right and possession of the
 “ said *Frances*, during the continuance of the marriage, and
 “ the proceeds thereof, only, shall be applied to the sup-
 “ port and maintenance of the said [*John and Frances*,]
 “ and their *issue*, if any there be,) contains the decla-
 “ tion of the *uses* thereof, for that period only ; and
 “ that the subsequent covenant (whereby the said [*John*]
 “ doth FURTHER covenant and agree with the said [*Frances*]
 “ that he never will sell or dispose of any part of the said
 “ real or personal estate, (except as therein particularly ex-
 “ cepted,) in any manner whatsoever ; but that the same shall
 “ ALWAYS be held as an INVIOABLE FUND, for the support
 “ and maintenance of the said JOHN and FRANCES, and their
 “ ISSUE, if any there should be, applying only the proceeds or
 “ profits, without resorting to, or applying any of, the *original*
 “ stock for that purpose) must be understood and intended as
 “ a declaration of OTHER USES, than those before described
 “ and limited ; and the said [JOHN] being equally within
 “ the declaration of those other uses, as the said [*Frances*]

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“ or their *issue*, if any ; he must, according to a just
 “ and proper construction of that clause, be intended to be
 “ equally entitled to the benefit of those uses, as the others,
 “ for the full period of his natural life ; during which, in
 “ the event of *issue* born of the marriage, he would have
 “ had a *legal* estate, in the lands, and real estate, as tenant
 “ by the curtesy, if he had not covenanted to have the
 “ rents and profits, *certainly*, in lieu of the personal estate,
 “ to which he must be understood as renouncing all his
 “ rights, and also in lieu of the chance of being tenant by
 “ the curtesy of the real estate, in case he should have
 “ issue and survive his wife : that in decreeing a settle-
 “ ment to be made pursuant to those articles, it is neces-
 “ sary and proper that the said articles should be carried
 “ into execution, fully, and not in part only. Therefore in
 “ the settlement to be directed, every limitation contained
 “ *in*, or necessarily implied *by*, the articles, ought to be in-
 “ serted ; and the articles so framed, as to preserve the
 “ contingent remainders thereby proposed to be limited.
 “ That this can be done in no way so properly and effec-
 “ tually as by ordering and decreeing that the defendants
 “ [*John R. Archer and Frances Cook*, his wife] do, within
 “ a certain time to, be limited by the said Superior Court
 “ of Chancery, by deed of bargain and sale, or other suffi-
 “ cient conveyance, convey to such person or persons as
 “ the said Superior Court of Chancery shall name as trus-
 “ tees for that purpose, all the estate, real and personal,
 “ which was of the said [*Frances Cook*] on the [*17th day of
 “ *February*, 1801,] (except as in the said articles is excepted,)
 “ together with the progeny of the slaves, and the increase
 “ of the stocks of horses, cattle, sheep, and hogs, if any,
 “ which have come to the hands and possession of the said
 “ [*John R. Archer*, or *Frances Cook*] or either of them, or
 “ of any other person or persons, to the use of them or
 “ either of them ; the lands and other real estate, in fee-sim-

* In the case of *Randolph and others v. Randolph and others*, “ 19th day
 “ of *November*, 1800.”

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"ple, and the slaves, and other personal estate, in absolute
"property ; in trust, to permit the said [*John R. Archer*]
"to take and receive the rents, issues, and profits of the
"same during the joint lives of the said [*John R. Archer*,
"and *Frances*] his wife, and their issue, if any, without re-
"sorting to, or applying any of the original stock for that
"purpose ; and, from and after the death of either of them
"the said [*John* and *Frances*] to permit the survivor to take
"and receive the rents, issues and profits thereof, in like
"manner, and for the like purpose, under the like restric-
"tion ; and from and after the death of such survivor, to
"hold the said estate, real and personal, so to be conveyed
"to them, to the use of all and every child or children of
"the said [*Frances Cook*] born or to be born of her present
"[or any future] marriage, which shall be living at the time
"of the decease of the said [*Frances Cook*] and the descend-
"ants of such of the children of the said [*Frances*] as may
"die before her, (if any such there be,) as parceners, in
"parcenary, agreeably to the sixteenth section of the act di-
"recting the course of descents ; and, in default of such
"issue of the said [*Frances*] living at the time of her
"death,* [then and in that case to hold the whole of the
"estate so to be conveyed to them, in trust, for the use of the
"heirs of the said [*Frances Cook*] as parceners, in parcen-
"ary, agreeably to the directions of the beforementioned act
"of assembly ; with remainders to trustees to preserve con-
"tingent remainders.] With liberty to the said trustees to
"apply to the said Superior Court of Chancery, from time to
"time for an injunction, or injunctions to stay waste, or to pre-
"serve the said estate, real and personal, by such restraints
"against alienation thereof, as may be necessary and pro-
"per ; and that the several deeds and conveyances executed

* In the case of *Randolph and others v. Randolph and others*, omit the words included thus, [] and insert, "then from and after the death of the survivor of the said *Bathurst* and *Mary*, the trusts so to be created, to cease and determine, and the estate, embraced by the said marriage-articla, and settlement so to be made, to descend and pass to such persons, and in such proportions, as if such articles and settlement had never been made."

"by the said [*J. R. A. and Frances Cook*] or by any other person or persons to them, or either of them, for the purpose of defeating the said marriage-articles, be brought into the said Superior Court of Chancery, and there cancelled; and that the said Superior Court of Chancery do take such further order respecting the proof of the said deeds, and recording thereof in the District Court of *Petersburgh*, or the County Court of *Amelia*, or elsewhere, as in the opinion of that Court will best answer the purposes of preventing fraud and imposition in consequence of the proof of such conveyances, and admitting the same to record. And that the cause be remanded to the said Superior Court of Chancery, with directions to make and enter a decree pursuant to the principles herein stated, which is decreed and ordered accordingly."

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After the foregoing decree was pronounced, it was suggested by *Hay* and *Wickham*, that the decree was more extensive in its operation than was contemplated by the parties; inasmuch as it would require a settlement to be made of all the estate and interest of the wives, including as well that which had been allotted, as that held by *Mrs. Tabb*, in right of dower, and existing in outstanding debts. They contended, that, although the preliminary part of the articles mentioned all the estate, yet the specification "consisting" of such particular property, restricted their operation to that part which was specially enumerated. On the construction of deeds, they cited 3 *Com. Dig.* 330. *Sheppard's Touchstone*, 74, 75. 85. *Cowp.* 819. *Cooke v. Boosh*(a)

(a) *Sed vide*
5 *Term Rep.*
564. *Clifton v.*
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al.

Call, contra, said it was unnecessary to refer to books, on this subject, as it was a mere question of intention, to be gathered from the words of the articles; which, he contended, passed the whole estate.

May 17th, 1809. Judge TUCKER delivered the following opinion on the construction of the articles:

Mr. Hay for the appellees in these two causes, moved the Court to revise and correct the decrees therein made on the

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20th and 21st of *April*, upon this ground ; that the Court had directed the *whole* of the estates which belonged to the appellees, Mrs. *Randolph* and Mrs. *Archer*, previous to their marriage, to be settled pursuant to the directions of those decrees, whereas the reversionary right of those ladies to a proportion of the estate held by their mother, Mrs. *Tabb*, for her life, was not included in the marriage-articles.

This Court having unanimously established the principle that marriage-articles are to be considered only as the minutes, or heads of an agreement, which is to be carried into effect according to the true intent and meaning of the parties ; and that for attaining that end, greater liberality is to be observed in the construction of them, than of deeds or other contracts, *executed*, we have only to consult the articles, in the present case, to know what was the real intention of the parties.

Those between Doctor *Randolph* and his lady recite, that, whereas a marriage is intended to be solemnized between the parties, " and the said *Bathurst* is willing and desirous " of securing and settling upon the said *Mary* and her heirs " ALL HER ESTATE BOTH REAL AND PERSONAL, to which " she is ENTITLED, as one DISTRIBUTE of the estate of her " late father deceased, EXCEPT AS THEREIN AFTER EX- " CEPTED ; in consideration of the said intended marriage, " and for the intent and purpose aforesaid ; the said *Ba- " thurst* thereby covenants," &c. Words more comprehensive cannot in my opinion be used ; they shew that it was the intention of the parties to settle the *WHOLE* estate of the lady, *real* and *personal*, whether in *possession*, or *reversion*, or remainder, (EXCEPT as in the *articles excepted*,) to the uses thereby declared. If any part of the estate was omitted in the enumeration of the particulars thereof, it was a *mistake* in the drawer, which ought to be corrected, according to the precedent established in the case of *Flemings v. Willes*, 2 *Call*, 5. recognised by this Court in the preamble to these decrees.

It was conceded by Mr. *Hay*, that the articles between Dr. *Archer* and his lady, were stronger than those which

I have just noticed. I am therefore of opinion that the decrees were perfectly correct, and that no change ought to be made therein.

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Judge ROANE observed, that the words of the recital were very broad, and he should have been of opinion that they would have been abridged by the specification, if nothing else had followed. But afterwards the parties say, *except* certain property, naming it; by which the specification seems to have been given up; and then we can only resort to the recital, to explain the exception; in doing which *all* the estate will be comprehended, except that particularly excepted.

Judge FLEMING. In the construction of agreements, the whole must be taken together; and in viewing these it is my opinion, and the unanimous opinion of the Court, that the whole estate passes.

Jones's Devisees against Roberts.

The purchaser of an agreement for a lease and those under whom he claims, having committed such acts as would have amounted to a forfeiture, had a lease been actually executed with such covenants as were usually inserted in leases to other tenants of the same estate, shall not have the aid of a Court of Equity, to enforce a specific performance, against a judgment at law recovered by a purchaser of the fee-simple estate.

The acceptance of rent after a forfeiture accrued, is an equivocal act, and may, or may not, amount to a waiver of the forfeiture, according to the *quo animo* with which the rent was received.

THIS was a revived appeal from a decree of the Superior Court of Chancery for the *Richmond District*, pronounced by the late Judge of that Court. The cause was fully argued in *October term*, 1805; but before the Judges were prepared to give their opinions, the appellant (the honourable *Joseph Jones*) died, and the cause stood continued for proper parties, and for decision until the present term.

Joseph Jones, the testator of the present appellants, was the purchaser of an estate in fee-simple, incumbered with some leases, and contracts, or promises for leases made by those under whom he claimed. *Roberts* bought a tenement, or lot, of one of the persons claiming by the last mentioned species of right; and being in possession, relied on this dormant equity, refusing to come to any terms with *Jones*. Whereupon an ejectment was brought, and *Jones* having recovered a judgment at law, *Roberts* filed his bill in equity praying for an injunction, for a specific execution of the agreement for a lease, made by a prior owner of the fee-simple estate.

The case, as collected from different parts of the record, appeared to be as follows.

Robert Carter of *Nomini*, being possessed of a large estate in *Loudon County*, employed one *James Lane* as his agent or steward, with authority to collect the rents, and contract for leases, &c. The leases appear to have been usually for three lives, with covenants on the part of the lessees for certain improvements, and a clause in restraint of alienation without license from *Carter*.

February 25th, 1767, *William Musgrove* took the lot in question for three lives, as appears by a memorandum in the hand-writing of *James Lane*, of that date, signed by him. *Musgrove* dying in *December*, 1777, application was made by *Nathaniel Smith*, his administrator, for a lease pursuant to that memorandum. *Robert Carter* made the following endorsement on *Lane's* certificate: "JOHN *Musgrove*,

"No. 1. No. 4. *J. Lane's* certificate good." By this endorsement it was probably meant, that the lease promised to *William Musgrove*, now dead, should be made to his eldest son, *John Musgrove*, to whom *Mr. Carter* appears to have thought the right to the lease descended as *heir* to his father, for the lives of the said *JOHN Musgrove* and *Valendar Musgrove*; *William*, the third person whose name was to have been inserted in the lease, being now dead. No lease, however, appears to have been made, nor any further application to *Mr. Carter* on the subject. In this state matters remained until *August 14th, 1789*, when upon a compromise of a suit brought by *Charles Carter* for the above estate, *Robert Carter* made him a deed for one moiety, including the lot in question. *Smith*, in behalf of *William Musgrove's* estate, appears to have paid the rents regularly to *Robert Carter's* agent; the last receipt bearing date in *August, 1790*.

JOHN Musgrove having come of age, sold the lot in question to *Roberts*, the complainant in Chancery, and executed a deed, *September 23d, 1791*; *Nathaniel Smith* "at the time" of the sale having given him all the information he possessed relative to the title." *JOHN Musgrove's* deed to *Roberts* (which does not appear to have been recorded) recites the title to the lease in *William Musgrove* as above, and that the same by his death fell to *JOHN*, as his son and *heir*. This deed bears date about two years before a third writ of *elegit*, hereafter mentioned, was levied upon the lot in question; though the first writ was levied about the time of the deed.

August the 11th, 1791, *Mr. Pendleton* being about to levy an *elegit* on this estate, constituted *Thomas Pollard* his agent to superintend the levying of the same; with full powers, and directions to receive the attornment of the tenants to him, and to receive and give acquittances for their rents, as they should from time to time become due: engaging to confirm whatsoever he should do in the premises. Two writs of *elegit* were executed in *September, 1791*; and in *September, 1793*, a third was executed, which included the

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lot in question, then occupied by the complainant in Chancery, *Roberts*. *Pollard* states in his deposition that he received the rents from the several tenants (making no exception) for the years 1791, 1792, 1793, and 1794; *Mr. Pendleton*, in his letter of February 6th, 1794, requesting him to continue receiving the rents until a proposition made by *Charles Carter* to him, to sell as much of the land as would pay off his debts, should be completed. December 18, 1794, *Joseph Jones* the appellant, having full notice of the three elegits, purchased the whole estate of *Charles Carter*, subject to the same; and on the 31st of March, 1795, *Mr. Jones*, for the consideration of 1,240*l.* obtained from *Mr. Pendleton* a release of his claim, under the several writs of elegit. In *Charles Carter's* deed there is a covenant that the estate is free and clear of all incumbrances made by him except these elegits.

It is expressly charged in the bill, and put in issue, that *Mr. Jones*, before his purchase, went over the lands; knew that the complainant was in possession of the lot; often conversed with him about the estate, knowing him to be a tenant therein; had heard of the claims set up by the tenants; and he is expressly interrogated, what he knew or what he had heard of the claim and possession of the complainant before his purchase from *Charles Carter*. To these charges and interrogatories he pointedly answers that he is a stranger to the transactions between *Robert* and *Charles Carter*, previous to his purchase; that he does not recollect that *Charles Carter* consulted with him, or made any other communication respecting his claim or title to the lands, than might have been made to any indifferent person; that (with respect to what he had heard or been informed respecting the tenants' right before he purchased) he had always understood from *Charles Carter* that after he acquired a title to the land, he found some of the tenants had no leases, or other pretence to continue on the land, than that of promises, as they said, from *Robert Carter*, or his collectors; and, wanting the land to cultivate himself, he demanded possession, but they refused to yield it, under pre-

text of promises from *Robert Carter*, or his agents ; and that he should have proceeded to eject them, but from a conviction that he should soon be compelled to part with the land. He also states, that, after the purchase made by himself, he visited the tenants, and requested information on what terms they held their tenements : when he discovered that the complainant had no lease for the lot in question, or *produced none to him* ; that to ascertain the fact, he examined the records of *Loudon* and *Fairfax* Counties, and could find none ; that finding several other tenements in the same situation, he informed those tenants that unless they would give up their lots, or *come upon terms with him for renting them*, he would have ejectments served to obtain the possession, which the complainant refused to do, relying on his right to hold the land, on a promise from *Robert Carter*, or some agent or collector of his. And that he was unacquainted with the terms on which the tenants respectively held their tenements, until *after* he purchased the lands and the above investigation took place. The Chancellor perpetuated the injunction and directed that a lease should be made for the lot in question ; from which decree *Jones* appealed to this Court.

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[This cause having been argued before the period when the present reporters commenced the publication of the decisions of the Supreme Court of Appeals, the arguments of counsel are of course omitted.]

Tuesday, April 25, 1809. Judge TUCKER (after stating the case as above) proceeded :

That *JOHN Musgrove*, the son of *William*, (or *Smith* his administrator,) had an equitable title to a lease from *Robert Carter*, for the lives of himself and *Valendar Musgrove*, is, I think, fully proved, by the answer of *Robert Carter*, the deposition of *Nathaniel Smith*, and that of *Benjamin Dawson* ; and that, until *January, 1788*, when *John Musgrove* came of age, no laches is imputable to him, for not taking some steps to procure a legal title to such a term.

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But, from that period it is imputable to him ; for in agreements of this nature, both parties are agents. It was therefore equally incumbent upon *John Musgrove* to demand a lease, as upon *Robert Carter* to tender one. Eighteen months elapsed before *Charles Carter* became the purchaser ; and in all that time, nothing was done by *Musgrove* towards obtaining a lease. He does not even appear to have given *Charles Carter* notice of his claim. But in September, 1791, three years and a half after he became of age, and two years after *Charles Carter* had purchased the land, without any communication with, or license from him, he sells the lot to the complainant *Roberts*, puts him in possession, and makes him a deed, which is found among the exhibits ; recites the nature of *Musgrove's* claim ; and must have given the complainants full notice, if such notice had not also been proved by *Nathaniel Smith* in his first deposition. *Roberts* then was a purchaser with full notice of the nature of *Musgrove's* title. Now, although *Musgrove* had an indubitable claim upon *Robert Carter* for a lease, when he came of age to demand it ; it was a mere equitable title that he had to one, and that subject to all the covenants and conditions which it was mutually understood between *William Musgrove*, the father, and *Lane*, the agent of *Robert Carter*, were usually inserted in the leases which he granted. Among these was a covenant or condition against alienation without license, by which condition, *William Musgrove* and after his death *John* his son, were equally bound in equity as *Robert Carter* was to grant the lease for the three lives. *Roberts* had, or must be presumed to have had, full notice of all this when he bought the lot and took an assignment of *John's* right. *John Musgrove* therein engages to give every assistance in his power to *Roberts*, towards obtaining a lease. Why did not *Roberts* apply to *Charles Carter* for a lease, during the two years that intervened between his taking this assignment, and the levying the *elegit* upon the lands ? And why did he not apply or make known his claim, either to *Charles Carter*, or Mr. *Pendleton*, for eighteen months after ; and before Mr. *Jones*

had become a purchaser from *Carter*; and a still longer period before he purchased the right of the tenant by *elegit*? Lastly; why did he not shew the deed of assignment from *Musgrove* to Mr. *Jones*, when requested to communicate his title? but, on the contrary, why did he studiously and mysteriously conceal it? Was it that he might drive him to bring an ejectment, and when he had got a judgment against him for his lands, conjure up this dormant equity, the evidence of which had slept for near twenty years, for the purpose of saddling him with the whole expense of a suit at law, and another in equity? This *wilful concealment* on his part, in my opinion, ought not to operate to his advantage, and to the vexation, delay, and injury of a person pursuing his legal rights, without knowledge of this dormant equity, and without the possibility of discovering it by his own researches and exertions. No fraud, collusion, neglect, or other fault whatsoever, is imputable to Mr. *Jones* in the whole transaction; yet, (if I understand the course of the Court of Chancery, though not expressed or even noticed in the decree,) may he be condemned to pay the costs of both suits. The rule *caveat emptor*, applies to *legal*, not to latent, and much less to wilfully concealed, *equitable* rights.^(a) Had the complainant made known the nature of his claim to the defendant, when he desired it, and proposed to come upon terms, all the trouble, expense, and delay, which have ensued from his refusal would probably have been avoided. Having defended his title at law, instead of acceding to so reasonable a proposal, or at once bringing his bill for a lease, I conceive that he is not entitled at this day to the aid of a Court of Equity; his own conduct throughout being a violation of its rules.

But this is not the only ground on which I think *Roberts* not entitled to the aid of a Court of Equity. Being the purchaser of an equitable title only, with full, or, at least, strong presumptive notice, that the tenant was restrained from alienation without license. No equivocal act of a

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(a) 1 Wash.
217. 338, 339.

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fair purchaser, for a valuable consideration, of the fee-simple estate, not having notice of the nature of his title, ought to have any effect upon his case, unless it shall appear to the satisfaction of the Court that such act could not have been done *diverso intuitu* from that which is contended for. The acceptance of rent from the alienee, or assignee of a tenant who is restrained from alienation without license, is one of those equivocal acts, which may, or may not, amount to a recognition of his title, and a waiver of the forfeiture, according to circumstances. *Roberts* purchased at the very time that *Mr. Pendleton* sued out his first and second writs of *elegit*, and though neither of these writs were levied upon the lot in question, it no where appears that he ever paid any rent to *Charles Carter*, nor indeed to *Mr. Pendleton*; all the receipts taken, up to the 21st of *February*, 1795, which was after *Jones's* purchase from *Charles Carter*, being in the name of *Nathaniel Smith*, who, as administrator of *William Musgrove*, had paid the rent for the space of nearly one and twenty years before; the first receipt to him bearing date *March 13th*, 1774. The acceptance of rent by *Mr. Jones* himself (as stated in the bill itself, and therefore need not be proved on his part) was on a condition that it should not affect his title.^(a) The presumption that the rent was accepted from *Roberts*, with a full notice of the nature of his title, is thus completely done away; and having gained a possession contrary to the equitable condition annexed to *Musgrove's* title, of which he must be presumed to have had full notice, he is to be regarded as a mere tenant at sufferance, or, at most, as tenant at will. In neither of these characters would he have any pretensions to a lease from the appellant. But his possession has been relied on, as sufficient notice to the purchaser, that he must take the land with peril in equity of every right which the holder can assert against the seller. To this it is enough to answer, that every person who occupies the land of another as *tenant*, is in law a tenant at will, unless he can shew a lease of his lands, whereby his term is rendered certain. I have already shewn that the purchaser

(a) See
Cowp. 245.

made every inquiry and scrutiny which a knowledge of that possession would have led to. And to me it appears that *Roberts's* equity, be it what it might, would have been, and was, destroyed by his subsequent conduct to the appellant, for the reasons already mentioned.

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A further reason why *Roberts* appears to me not to be entitled to the aid of a Court of Equity, arises from this circumstance. If he was entitled to a lease at all, it was such a one as the Chancellor has directed to be made, with covenants, as in *Robert Carter's* lease to *Henry Taylor*. I have before said that *John Musgrove*, and, I will now add, all who claim under him, were in equity equally bound by the terms and covenants which were to have been contained in the lease, as they would have been at law, if the lease had been executed by both parties and recorded. Among the covenants contained in *Taylor's* lease, one was that the lessee should, within three years from the date of the lease, build thereon a good dwelling-house, of certain dimensions, another house of certain dimensions, as good as common tobacco-houses, and plant fifty apple-trees, and fifty peach-trees, inclose the same with a lawful fence, and at *all times* during the term, well and sufficiently maintain and keep all and singular the messuages, buildings, and fences, &c. in good and sufficient repair. Another covenant is, that the tenant should not, without license in writing, work more than four labouring hands; nor commit or suffer any waste; nor sell or dispose of the premises without license; nor suffer any of the wood or timber thereon to be disposed of otherwise than for the building fences, and necessary uses of the plantation; and finally, that in case of breach or failure of any part of the above covenants, the lessor, his heirs and assigns, might re-enter, and hold the land, as if that deed had never been made.

Equity considering that to be done which ought to have been done, will refer the commencement of the lease to the time when *Robert Carter* made the promise to *Smith*, to grant a lease to *John Musgrove*, for the two remaining lives. Although it should be contended that the infancy of

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*John Musgrove* should protect him from forfeiture, on account of the non-performance of the covenants on his part ; yet his infancy expired, as I have before noticed, in *January*, 1788. From that period his infancy could be no protection : *Roberts* purchased in *September*, 1791, three years and a half after *John Musgrove* came of age, six months after the time when the improvements ought to have been made, supposing *John Musgrove's* lease to have been dated the day he came of age. Two years and a half more elapsed before *Jones's* purchase from *Charles Carter* and from *Mr. Pendleton* was finally completed. In his answer, by way of defensive allegation, and as a reason why he should not be compelled to make a lease according to the prayer of the bill, he states, " that there are no improvements on the lot in dispute, such as required by the leases, " and the land is very much cleared, and abused." The fact thus put in issue by the answer goes to a full denial of the plaintiff's equity. The depositions of *John Taylor*, *Nathaniel Smith*, *Thomas Pollard*, and *Daniel Ficklin*, establish the fact beyond the possibility of doubt, there being no conflicting testimony with respect to it. The latter mentions, " that he once saw *Roberts* setting up a large " kiln of wood for coals, which have since been burnt " and carried away, and believes he saw another." This was not merely permissive, but wilful waste. It is a principle in equity, that he who demands the execution of an agreement ought to shew that there has been no default in him, in performing all that was to be done on his part. For, if either he *will not*, or, through his negligence, *cannot*, perform the *whole* on his side, he has no title in equity, to the performance of the other party ; since such performance could not be mutual ; nor will equity decree a specific performance, in his favour, *especially if circumstances are altered.*(a) To say nothing of the non-performance of the covenants respecting buildings, orchards, and keeping the premises in repair, what compensation can *Roberts* now make for the waste and destruction which it is thus proved he has committed ? Will equity decree in favour of a party who

(a) 1 *Pomb.*  
391, 392.

comes into its Court with such unclean hands? Will it declare that the appellant was not equally entitled to the benefit of the covenants intended to have been comprised in the lease, as the appellee? And, if so, will it relieve the appellee against a judgment at law, which, for aught that appears to the contrary, the appellant might have been entitled to, though *Robert Carter*, *Charles Carter*, or *Edmund Pendleton* had sealed the lease which the Court of Chancery have directed the appellant to execute; I think not, and for all these reasons am for reversing the decree, and dissolving the injunction, &c.

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Judge ROANE. This case, considered independently of any unauthorised acts of commission or omission, in relation to the promises, on the part of the appellee, or those under whom he claims, and supposing the legal title acquired by Mr. *Jones*, to be out of the case, would be very strong in favour of the appellee. I should, in that view, *probably* get over the objection that the *particulars* of the title of the appellant are not set out and deduced in the bill; nor should I have much doubt but that the case of the appellee (taking *Taylor's* lease as a model, and founding a construction upon the *whole* instrument) would justify the title and entry of *William Musgrove's* heir, from whom the appellant claims. The case, however, as it is, and considered in relation to *Jones*, lies within a narrow compass, and I shall not, therefore, enter particularly upon the above topics.

It cannot be doubted but that *Musgrove's* lease, had it been obtained, would have contained stipulations on his part for the building and repairs of houses, and the planting of orchards; as also for the keeping a *limited* number of hands on the premises, and against the destruction and carrying away of timber, &c. Considered as a lease for *lives*, which might at any time expire, the former stipulations ought to have been forthwith performed, else there might have been no houses nor orchards on the premises for the next tenant, and thus a beneficial lease to others might

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have been prevented ; and the covenants of the latter class, if broken, inflicted a lasting damage upon the inheritance.

On the testimony, none of these stipulations have been complied with, and yet the appellee has to contend against a *legal* title. It is supposed that a cause of forfeiture in the premises, incurred by those under whom *Roberts* claims, and not waived by some act of *Jones*, or those under whom he claims, would bind *Roberts*, as much as one committed by himself, and in the time of the present appellant. But it is shewn in evidence, in addition, that there is not only a neglect to build, and plant orchards, and keep them in repair, by *Roberts*, after *Jones's* title accrued, and up to the present time, but also that *Roberts* himself burnt coal and carried it off the premises. This (to say nothing of the injuries committed on the land by extensive clearings) was long after any of those acts of *Robert Carter* or *Charles Cartier* which have been relied upon to import a waiver of the forfeitures. There is nothing, after this, which can be set up as having that effect, but the receipt of rent by *Pendleton's* agent. As for such acceptance on the part of *Jones*, he expressly denies that he ever received any after the purchase from *Cartier* : the only question on this ground then, is, whether the receipt of rent by *Pollard* for *E. Pendleton*, of 21st of *February*, 1795, (or, indeed, any other receipt for rent,) could have that effect.

It is here to be remarked, that, by *Taylor's* lease, the rent was to be paid at the house of the lessor in *Westmoreland* County : and can it be reasonably inferred that the lessor *knew of* breaches of covenants committed, perhaps, two hundred miles off, or that he meant to release them ?

(a) *Cowp.*  
245.

Certainly not. The case of *Doe, ex dem. Cheny, v. Batten*, (a) shews us that the question always is, *quo animo* the rent was received, and what was the real intention of both parties. To say that this acceptance amounted to waiver of the forfeiture incurred by non-performance of the covenants, which were to be performed on the land, would amount to a release of such covenants in *all* cases, unless indeed the lessor had changed his stipulation as to the place

of receiving the rents, and agreed to receive them on the premises, or had *bound himself* to keep an agent on or near the premises ; neither of which he has done, or was bound to do, in this case.

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On the ground, then, that the *mere* acceptance of rent has not the effect of waiver in the case before us ; that the appellant has got the law on his side by the recovery in ejectment ; and that the appellee, or those under whom he claims, have committed material wrong and injury, in relation, as well to the temporary, as the permanent interests of the inheritance, I am of opinion, that the appellee is not entitled to arrest the legal title of the appellant, and that the decree should be reversed and bill dismissed.

Judge FLEMING. There being a judgment at law against the appellee for the land in controversy, he comes into a Court of Equity for relief, in which he states his equitable title to the premises to be, that in *February, 1767, James Lane*, the agent of *Robert Carter*, then proprietor of the land, gave to *William Musgrove*, under whom the appellee claims, a written promise that he should have the lot in question for three lives, and put him in possession : that about the year 1779 or 1780, (*William Musgrove* being then dead,) *Robert Carter* promised *Nathaniel Smith*, the administrator of *Musgrove*, and guardian to his children, to make a lease, conformably to the paper signed by *Lane*, and send it up ; which paper was left with the said *Robert Carter*, for that purpose ; but a lease was never made : that afterwards *Robert Carter* conveyed the land, by a deed of compromise, to *Charles Carter*, who sold and conveyed it to *Joseph Jones*, the appellant. The most favourable situation in which *Roberts* can expect to be put, is, that he stand in the place of *Musgrove*, and Mr. *Jones* in the place of *Robert Carter* ; and that a lease should have been made by the latter immediately after the written promise of *Lane*, or in the year 1779 or 1780, when *Smith*, the administrator of *Musgrove*, and guardian of his children, applied for one. We are next to inquire what kind of a lease he had a right to expect, and the only guide we have on the subject is a copy of a



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lease from *Robert Carter* to *Henry Taylor*; another tenant on the land, dated the 16th of *October*, 1755, referred to in the decree, and spread upon the record, in which there are several important covenants to be performed by the tenant, as have been stated by one of the judges who has preceded me. It is presumed that neither *Musgrove*, nor those who claim under him, had any just pretensions to a lease on terms more favourable than those in that above recited; and when the appellee came into a Court of Equity, for relief against a judgment at law, he should have appeared with clean hands and a pure front, and shewn that he had himself done equity, by fulfilling the several covenants contained in the recited lease; but so far was he from having done so, that it is in evidence, by the testimony of four witnesses, to wit, *Taylor*, *Smith*, *Pollard*, and *Ficklin*, that the premises are in a ruinous state, that neither fruit-trees have been planted, nor houses erected, agreeably to the covenants aforesaid, and that such as have been erected, were, at the time of taking the depositions, rotting and tumbling down. And it is moreover proved by the deposition of *Ficklin*, that the present tenant, *Roberts*, committed actual waste, by cutting wood, and burning charcoal, and conveying it off the premises.

It seems almost unnecessary to remark, that it is of the highest importance to the proprietors of lands, let out on leases, and especially on long leases, that the covenants contained in them, for the improvement of the lands, and for the prevention of waste, should be strictly and punctually fulfilled; and I shall only add, that it is my opinion that the appellee, by his unwarrantable conduct in failing to erect the buildings, and to plant the fruit-trees mentioned in the covenants; and also in not only permitting, but actually committing, waste on the premises, has forfeited his equitable title, if any he had, and that the decree ought to be reversed, the bill dismissed, and the appellant, or his representatives, (he being dead,) allowed the benefit of the judgment at law.

By the whole Court, the decree of the Superior Court of Chancery reversed, and the bill dismissed.

Beasley against Owen.

Monday,  
April 17th,  
1809.

AT the last term, this cause was argued and decided ; but, at Mr. *Hay*'s request, who stated it to be a case of the first impression on a branch of our statute of frauds, which was not to be found in the statute of 29th *Car.* II. and that it was of great importance that such an adjudication should be made as would most effectually prevent frauds, in the *loan* of personal property, the Court consented to a re-argument at the present term ; and accordingly directed the Clerk to set aside the judgment. The Clerk, not hearing the directions of the Court, omitted to make the entry ; and the question now was, in what manner the cause should again be put on the docket.

If the Clerk of the Court of Appeals be directed by the Court to set aside a judgment, and, by misapprehension, the entry of the order be omitted, it may be done at a subsequent term, and the cause re-docketed.

Construction of the statute of frauds and perjuries, as to loans of slaves.

Mr. *Hay* cited *Thornton v. Corbin*,<sup>(a)</sup> as in point.

Mr. *Call* (as *amicus curiæ*) also cited *Murray* and others *v. Carrot & Co.*<sup>(b)</sup> in which case, he observed, a similar order had been made.

*W. H.* by his will, dated in 1789, gave a slave, then in possession of his son-in-law, *W. B.* to his two grand-sons, *J. B.* and *E. B.* (sons of the said *W. B.* and at that time infants,) as soon as they should come to lawful age ; in 1792, he verbally lent the slave to his said son-in-law, "for the purpose of assisting in the maintenance of his children," reserving the *years* after-grand-child the slave was that the re- of the statute of the credit-

The directions of the Court, in this case, were recollected by the bar, and noted by Judge *Tucker*, as well as by the reporters.

Judge *ROANE* considered this a much stronger case than *Thornton v. Corbin*. There the omission arose from a mistake of the counsel ; here it was the act of an officer of the Court, whose duty it was to make the entry. He was in favour of re-docketing the cause.

Judge *TUCKER* said, that having himself taken a note of the resolution of the Court, and being assured also by the

(a) 3 *Call*, 221. 232. (b) 3 *Call*, 373.

right to take him back whenever he should think proper ; and, in 1796, four wards, died ; in the same year his will was admitted to record, the surviving being still under age ; in 1801, when that grand-child attained his full age, taken in execution, and publicly sold as the property of *W. H.* It was held cording of the will, in 1796, was a sufficient declaration, within the meaning of frauds, to protect the right of the grand-child, in opposition to the claims of the father.

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gentlemen who report its decisions, that such an order was made, he could have no difficulty in granting the motion to re-docket the cause, especially as it was warranted by precedents.

Judge FLEMING concurring ; the cause was re-docketed by the unanimous opinion of the judges.

*On the merits.*

This cause was argued, at the last term, by *M'Rae*, for the appellant, (*Beasley*), and *Hay*, for the appellee, (*Owen*), and again, at this term, by *George K. Taylor* and *M'Rae*, for the appellant, and *Hay*, for the appellee.

The facts, as disclosed by the appellant's bill of exceptions, (who was defendant in the Court below,) were, that *William Hurt*, grandfather of the appellant, lent, in the year 1792, a slave, the subject of the present controversy, to his son-in-law, *William Beasley*, (the appellant's father,) to assist in maintaining his (the said *William's*) children, reserving the right of taking back the said slave when he should think proper ; that the said *William Hurt* departed this life, in the year 1796, before the expiration of *five years* from the time of the loan, and while the appellant was an infant ; that the said *William Hurt* had previously, by his will, bearing date the 31st of *August*, 1789, which was partly proved in *Nottoway County Court*, in *December*, 1796, and fully proved on the 5th of *January*, 1797, (and which is set out in *hæc verba*,) among other things, bequeathed the said slave as follows : " Item, I give unto my two " grandsons, *John Beasley* and *Edwin Beasley*, the negro " man, now in possession of *William Beasley*, their father, " as soon as they come to lawful age, to be equally divided " between them, to them and their heirs forever. Item, " my will is, that my son-in-law, *William Beasley*, shall not " have any part of my estate, except what I had given him " in the life-time of my daughter *Anne*, his late wife ;" &c. that *John Beasley*, the brother and co-legatee of the appellant, died in the life-time of the testator ; and that the

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other distributees of the estate of *William Hurt*, the grandfather, had released all their right to the slave in question to the appellant; that the appellant became of full age in 1801, and was living, as a storekeeper, with a merchant in *Petersburg*, at that date, when the slave was seized, and publicly sold, by the Sheriff of *Charlotte County*, (about 90 miles distant from *Petersburg*), by virtue of an execution against the goods and chattels of the appellant's father, *William Beasley*; and the appellee became the purchaser, as the highest bidder, at the sale; (which was not proved to have been forbidden;) that the said *William Hurt* delivered the slave to *William Beasley*, more than five years before the seizure and sale aforesaid, and that he had continued possessed of the said slave from the time of such delivery, until he was so seized and sold by the sheriff; that, after the appellee (who was the plaintiff in the Court below) had purchased the slave as aforesaid, and had him in his possession, the appellant, in *February*, 1802, possessed himself of him; to regain which possession, an action of *detinue* was brought, to which the defendant pleaded *non detinet*, and issue thereupon.

On the above statement of facts, the plaintiff moved the Court to instruct the Jury, that the peaceable and uninterrupted possession, by the said *William Beasley*, of the slave in question, by virtue of a loan from *William Hurt*, having continued from the year 1792 till the year 1801, subjected the said slave to the payment of the debts of the said *William Beasley*, by execution in the year 1801, although *William Hurt*, the lender, died in the year 1796, after having made a will, in which the said slave is bequeathed, as aforesaid, to his two grandsons. The Court did so instruct the Jury, and the defendant excepted to their opinion. Verdict for the plaintiff for the slave, of the price of 140*l.* and 150 dollars for detention. The defendant appealed to this Court.

*M'Rae*, for the appellant. The ground of the instruction of the Court below was, that the loan made by *William*

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*Hurt* was not a *bona fide*, but a pretended loan, coming within the meaning of the statute of frauds. We contend that it was a fair transaction.

On comparing our statute of frauds with the 29th Car. II. it will be observed, that no provision exists in the latter respecting *loans* : it follows, then, that no adjudication of the Courts of *England*, founded on that statute, can apply to the case before us.

If the loan, which was made in 1792, had continued for more than five years, without demand, or declaration made shewing that the purposes of the loan were fair, there could be no question but the purchaser of the slave would be protected ; but, according to the letter and meaning of the act, this loan ought to be considered as preventing the mere *possession* from giving a title. It is true, at the time of the loan, there was no declaration ; but the person lending died in 1796 ; and the person enjoying the loan had had the slave in his possession for *four* years only, when the will of *Hurt* was proved, which made a disposition of the property, and was a complete declaration within the meaning of the act.

The five years not having elapsed, the right of the lender existed as fully then as when the slave was lent. The four years' possession did not give a title. Where is the difference between the lender's making a declaration by his will, and doing it the next day after the loan made ? The possession not having given right, there was nothing to prevent the lender from disposing of the slave by his will.

No fraud appears in the whole transaction. The loan was publicly made, for the laudable purpose of supporting the infant grandchildren of the lender, who reserved the right of taking back the property whenever he should think proper.

*Hay*, for the appellee. *William Beasley* was in possession of the slave in 1801 : by virtue of an execution, he was taken and sold, in the year 1802, and the appellee (*Owen*) became the purchaser : it is now contended that *Beasley* was not the proprietor ! It is not material whether he was

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the proprietor or not. He had been in possession so long, that, according to the laws of the land, the property was liable to be taken in execution. He had had the uninterrupted possession from 1792 to 1801; was the ostensible owner to all the world; and it is now insisted, that a fair purchaser of this property, under execution, shall be deprived of it!

There was, in *William Beasley*, (notwithstanding the intervention of the death of the testator,) a *continued possession* of the slave, sufficient to protect a purchaser. It is the *possession*, unaccompanied by a declaration at the time of the loan, or uninterrupted by process of law, which the statute regards.(1) The question of *fraud* was not considered by the Court below. It was not a contest between persons claiming under *Hurt*, but between a purchaser for valuable consideration, and a mere volunteer.

The declaration in the will of *Hurt*, has been relied upon by Mr. *M'Rae*. But the loan was verbally made. A subsequent declaration that a person has made a loan, does not take the case out of the statute. The law requires that the declaration should be made by *that deed*, or *that will* under which the benefit of the loan is claimed.

It is no objection to the title of the purchaser, that *Hurt* died, and that his will was published before the expiration

(1) The statute of frauds and perjuries was first passed in *Virginia*, in the year 1785, and took effect the first day of *January*, 1787. (See *Rev. Code*, v. 1. c. 10. p. 15.) The statute 29 *Car. II.* was never adopted in this State. The clause respecting *loans*, is in the following words: "Where any loan of goods and chattels shall be pretended to have been made to any person with whom, or those claiming under him, possession shall have remained by the space of five years, without demand made, and pursued by due process at law, on the part of the pretended lender, or where any reservation or limitation shall be pretended to have been made of a use or property, by way of condition, reversion, remainder, or otherwise, in goods and chattels, the possession whereof shall have remained in another, as aforesaid the same shall be taken, as to the creditors and purchasers of the persons aforesaid so remaining in possession, to be fraudulent within this act, and that the absolute property is with the possession, unless such loan, reservation, or limitation of use or property, were declared by will or by deed, in writing, proved and recorded as aforesaid;" i. e. if it include lands, as conveyances of land; if personal estate only, by two witnesses.

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(a) 2 Hen. &  
Munf. 289.

of five years. The limitation having once begun to run, it never ceases to operate. This principle was recognised in *Fitzhugh v. Anderson*.<sup>(a)</sup> But, in truth, the slave vested in the executors of *Hurt*; and the time he was held by them is to be added to the previous time, so as to constitute one continued term.

The very point decided in *Fitzhugh v. Anderson*, exists in this case; and although that occurred anterior to our statute of frauds, yet, on general principles of law and equity, and for the protection of creditors, it was held that the loan should be deemed a gift.

*M'Rae*, in reply. The case of *Fitzhugh v. Anderson*, did not turn on the construction of our statute of frauds, and the cases are totally different in all their leading circumstances. In that case, the loan was for an indefinite period, and for no specified object: the son enjoyed the slaves for a great length of time; used them as his own; removed to a distant county, and acquired credit on the strength of his possession. That decision may be very correct, and still a very different one might, with great propriety, be given in this case. Here the loan was for a definite period: the object was, the support of the grandchildren of the lender; and so far from being fraudulent, it was humane and honourable.

Wednesday, March 22. The Judges pronounced their opinions.

Judge TUCKER. By the statute of frauds and perjuries, it is among other things enacted, "that where any loan of goods and chattels, shall be pretended to have been made to any person, *with whom*, or those claiming under him, possession shall have remained for the space of five years, without demand made and pursued by due process at law, on the part of the pretended lender, the same shall be taken as to CREDITORS and purchasers of the persons aforesaid, so REMAINING IN POSSESSION, to be fraudulent within that act,

“ and that the ABSOLUTE PROPERTY *is with the POSSESSION,*  
 “ unless such loan, reservation, or limitation of use or pro-  
 “ perty, were declared by will, or by deed, in writing,  
 “ proved and recorded as therein before directed.”

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It appears by the bill of exceptions, that *William Beasley*, the debtor, in whose possession the slave in question was taken, by virtue of a writ of *feri facias*, and sold at public auction, by the sheriff, to the plaintiff, *Owen*, had been in peaceable possession of that slave from the year 1792, to 1801, under a loan thereof, from one *William Hurt*, who died in 1796, having made his will, dated in 1789, whereby he bequeathed the slave to the appellant, his grandson, who was not of age until 1801; and that *Hurt's* executors proved his will, and qualified as executors thereto in December, 1796. The clauses in the will which are relied on, in favour of the appellant, as taking the case out of the statute of frauds and perjuries, are as follows: “ Item, I give  
 “ to my two grandsons, *John Beasley* and *Edwin*, the negro  
 “ man now in the possession of *W. Beasley*, their father, as  
 “ soon as they may come to lawful age, to be equally di-  
 “ vided, &c. Item, my will is, that my son-in-law, *W.*  
 “ *Beasley*, shall not have any part of my estate, except what  
 “ I had given him in the life-time of my daughter.” The will was proved in *Nottoway* County, where the testator appears to have resided. The seizure and sale of the slave were made by the Sheriff of *Charlotte* County. There is no residuary clause in the will, so that the value of the labour or hire of the slave from the testator's death until his grandson came of age in 1801, was undisposed of; the legal right to the slave and to his labour and hire, until that period, was consequently in the executors.

In considering this case, I am much inclined to doubt whether parol evidence of a loan of a slave, or of the conditions of such a loan, be admissible in a contest between a creditor or purchaser, from the person in possession, after that possession shall have continued peaceably, and without demand, for five years; upon the grounds of this Court's decision in the case of *Jordan v. Murray*,<sup>(a)</sup> and in *Tur-* <sup>(a) 3 Call, 25.</sup>



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(a) 1 Wash.  
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*ner v. Turner*, (a) there being the same reason, I conceive, for rejecting such evidence of a *pretended loan*, SINCE the statute of *frauds* and *perjuries*, as of a *pretended gift*, under the act of 1758, c. 1. But, as no exception was offered to the admission of such evidence, I pass it over. The object of the statute of *frauds* and *perjuries*, seems to me to have been, to shut out all question respecting the *property* of a slave held in possession by a *debtor*, or *vendor*, for the space of five years, as between a *creditor* of, or a *purchaser* from, the person, in whom such *possession* has remained without demand for five years, and the person claiming such slave as his own absolute property, by virtue of any loan, reservation, or limitation of a use thereof, or property therein, unless such loan, &c. were declared by will or by deed in writing, proved and recorded, as by that act is required. In the present case, I doubt whether the bequest contained in the will of *W. Hurt*, is sufficiently clear and explicit to answer the purposes of the act, by giving notice to all persons that the paramount right, and absolute property in the slave, *whose name is not mentioned*, still remained in the representatives of the testator, *William Hurt*, notwithstanding the *possession* was and (as would appear from the will) had been in *W. Beasley* from the year 1789, to the time that the slave was taken in execution in the year 1801. But as a majority of the Court are satisfied upon that point, I shall urge it no farther : and only add, that I am of opinion, that the judgment be affirmed.

Judge ROANE was of a different opinion, and assigned his reasons for reversing the judgment, which need not here be stated, his subsequent opinion in this case rendering it unnecessary.

Judge FLEMING concurred with Judge ROANE.

On the last day of the term *Hay* moved the Court to reconsider the case, which motion being granted, he submitted the following propositions :

1. That the statute, on which the case depends, being a statute for the prevention of frauds, is to be liberally and beneficially construed, in favour of those whose interests it is the avowed object of the law to protect.

2. That the case of Mr. *Owen*, a purchaser, under an execution, of property which had been held for nine years, under a loan, is not only within the policy, but the very words of the law.

3. That where slaves, &c. are loaned, the will or deed, by which they are to be exempted from the provision of the law, must *precede* or *accompany* the loan, and not *follow* it.

4. That if a subsequent declaration be sufficient, the will of *Hurt* does not declare a *loan*.

5. That if it did declare a loan, the omission of the *name* of the slave would be fatal.

6. That if the will did declare a loan of the slave in question by *name*, it would not avail, as the loan declared by the will in 1789, could not be the loan proved in 1792.

7. That if the will has any bearing on the subject at all, it is to revoke the loan ; but this revocation not having been followed up by "*demand made and due process of law*," *Beasley's* possession, after *January*, 1797, was, in fact and in law, a continuation of the possession which commenced in 1792.

These propositions were amplified and illustrated by Mr. *Hay*, in his answer to Mr. *Taylor*, who opened the argument at this term. Mr. *M'Rae* closed the discussion, in a reply to Mr. *Hay* ; but, the few points, not touched on in the former argument, having been fully considered by the Judges, it is deemed unnecessary to repeat them.

*Tuesday, May 9.* The Judges again delivered their opinions.

Judge TUCKER. Upon consideration of the arguments offered on the rehearing of this cause, I adhere to my for-

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mer opinion, that the judgment of the District Court be affirmed.

Judge ROANE. The *general* question propounded by the plaintiff in the Court below (the now appellee) for the opinion and instruction of the Court, and on which the instruction we are now reviewing was founded, is, whether the possession of a slave under a loan, for more than five years, subjects that slave to pay the debts of the *lender*, under an execution against him, if, *within the five years*, a will has been made and recorded, conveying the property in the said slave to another.

It is clearly admitted on all hands that a resumption of the slave within that time would put an end to the loan; and I am of opinion that the making and recording a deed or will, within the time aforesaid, granting away the slave to another will have the same effect. The 3d clause of the act of frauds,<sup>(a)</sup> has put the recording of a deed or will avoiding a loan by way of limitation or otherwise, on the same footing with an actual resumption of the property. Such recording is deemed to be a notice to the world, adequate to do away the presumption of *property* otherwise inferable from a possession of five years. In a previous part of the same section respecting conveyances of goods and chattels on considerations not deemed valuable in law, the act has put the proving and recording thereof on the same ground with the actual delivery of possession; and in *Claiborne v. Hill*, 1 Wash. 177. in the case of a mortgage of slaves a delivery of possession to the mortgagee is held to be *supplied* by recording the deed of mortgage. The analogy of these cases to the one before us is very strong, in aid of the terms of the clause in question; and, as a resumption of the property within the five years would, in the case of a loan, prevent the effect of the clause in question, so will the recording a deed or will, within the time aforesaid, containing limitations adverse to the title of the *lender*: the notice given to the world, thereby, touching the right of property, prevents the mischief intended to

(a) Rev.  
Code, v. 1. p.  
18.

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be guarded against by the act ; and, it is unnecessary that such recording should be *coeval* with the date of the loan ; it being sufficient if done at any time within the five years.

It is objected, however, that the will, which is set out in the bill of exceptions, not having bequeathed the slave in question to the appellant and his brother *by name*, a sufficient notice was not given the world, on this subject, by proving and recording the same. I answer, first, that this is making the case of the plaintiffs better than he himself has made it in his address to the Court ; for he there admits, that *the slave in question was disposed of by the said will to the defendant ; secondly, that although the name of the slave is not used in the will, he is described as being the " negro man now in the possession of William Beasley ;" and " id certum est quod certum reddi potest ;" and, thirdly, that, on the other hand, the said will inhibits a right of property in William Beasley to " any part of the testator's estate, " except what he had given him in the life-time of his late " wife." By means of these several criteria, it might as certainly have been collected from the will, taken in connection with other testimony and circumstances, that the slave in question is the one bequeathed in the will aforesaid, as if his name had been particularly stated. Indeed, in that case, if this negro had been bequeathed by his proper name rather than by a description, it would have been necessary to have ascertained, by evidence *dehors* the will, that any given slave was the slave therein intended.*

On these grounds, I am of opinion, that the instruction of the District Court was erroneous, and that the judgment ought to be REVERSED.

Judge FLEMING. The only material point in this case is, whether the slave in question was the property of *William Beasley*, at the time he was taken in execution by the Sheriff of *Charlotte* ; and as the case of *Fitzhugh v. Anderson* and others, was relied on by the appellee's counsel as decisive in this, it may not be amiss to shew that the two cases are

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essentially different in some of their most prominent features.

It appears, by the bill of exceptions, that prior to the year 1780, *William Beasley*, father of the appellant, had intermarried with *Ann*, a daughter of *William Hurt*, by whom he had two sons, to wit, *John Beasley*, who died an infant, and *Edwin Beasley*, the appellant : also two daughters. That on the 31st of *August*, 1789, the said *William Hurt*, duly made and published his last will and testament, (his said daughter, *Ann Beasley*, being then dead,) by which said will he bequeathed the slave in question to his two grandsons, *John* and *Edwin Beasley*, as soon as they may come to lawful age, to be equally divided between them ; and willed, that his son-in-law, *William Beasley*, (father of the appellant,) SHOULD not have any part of his estate, except what he had given him in the life-time of his late wife, *Ann*, daughter of the testator, who died in the year 1796 ; that on the 1st day of *December*, in that year, his will was proved, by one witness, in the County Court of *Nottoway* ; and the executors then qualified under the will, which was fully proved on the 5th day of *January* following, and admitted to record ; that *John Beasley*, one of the legatees of the said slave, died in the life-time of the testator ; that the appellant attained the age of 21 years in the year 1801, and was then living a store-keeper, in the town of *Petersburg* ; when, in the same year, 1801, the said slave was publicly sold by the Sheriff of *Charlotte County*, by virtue of a *fiere facias*, issued against the goods and chattels of the said *William Beasley*, father of the appellant ; and that the appellee became the purchaser of the said slave at the sale. The plaintiff proved that *William Hurt* had delivered the said slave to *William Beasley* more than five years before he was seized and sold, and that he remained in possession of *Beasley* during the whole time.

The defendant proved, that his grandfather, *William Hurt*, did, in the year 1792, lend the said slave to his father, to assist in maintaining his children, reserving to himself the right of taking back the said negro whenever he might

think proper ; and that *William Hurt* died in the year 1796, before the expiration of five years from the loan aforesaid, and whilst the defendant was yet an infant. The only pretence of title, in *William Beasley*, is the length of possession under the loan, which was about four, or at most under five years, prior to the death of *William Hurt*, by whose will the slave was bequeathed to the appellant, and his infant brother, *John Beasley*, who (as before noticed) died in the lifetime of his grandfather. I consider the possession of *William Beasley*, subsequent to the death of the testator, merely as a TRUSTEE for his infant son, whose interest in the slave vested immediately on the death of his grandfather, to be consummated on his arrival to the age of 21 years ; and the recording the will of *William Hurt*, wherein he expressly declares that *William Beasley* should have no part of his estate, before he had five years' possession under the loan, was, in my conception, *legal notice* to creditors and subsequent purchasers ; and, it seems to me, that the warning of *caveat emptor* forcibly applies in the case before us. For, although our laws wisely guard against the practising frauds on creditors and fair purchasers, they are no less careful to guard and protect the rights of infants, and with much stronger reason, as the law justly supposes them incapable of acting for themselves. Some doubts that had arisen in my mind, on the first view of this subject, were removed on recurring to the latter part of the second clause of the "act to prevent frauds and perjuries," wherein it is enacted, that where any loan of goods and chattels shall be pretended to have been made to any person with whom, or those claiming under him, possession shall have remained by the space of five years, without demand made, and pursued by due process of law, on the part of the pretended lender, or where any reservation or limitation shall be pretended to have been made of a use or property, by way of condition, reversion, remainder, or otherwise, in goods and chattels, the possession whereof shall have remained in another as aforesaid, the same shall be taken as to the creditors and purchasers of THE PERSON aforesaid, so remaining in possession, to be

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fraudulent within this act, and that the absolute property is with the possession, *unless such loan, reservation, or limitation of use of property, were declared by will, or by deed in writing, proved and recorded as aforesaid.* The testator having declared, in his will, that *William Beasley should have no part of his estate, except what he had given him in the life-time of his wife, and having bequeathed the slave in question to the appellant and his brother, when they should come to lawful age, was a good and sufficient limitation of the use of the slave in William Beasley, although he, for the laudable purpose of assisting him in maintaining his children, was delivered to him, on loan, after the date of the will, and clearly shews that there was no intention of fraud or deception, which the act seems carefully to guard against.*

In the case of *Fitzhugh v. Anderson* and others, cited in the argument of this cause, and much relied on by the appellee's counsel, it appeared that *John Fitzhugh*, father of the complainant, *Dennis Fitzhugh*, had been in quiet possession of the negroes in controversy (many in number) for upwards of twenty years; had removed with them from *Caroline*, to the County of *Amherst*, and had there obtained extensive credits, on the strength of such possession, and many of them had come into the possession of fair purchasers, without notice of any other claim, long before the death of *William Fitzhugh*, the grandfather, (under whose will *Dennis Fitzhugh* claimed the negroes,) and who lived in the County of *King George*, 150 miles from the County of *Amherst*. From these circumstances there appears to me but little analogy between the two cases, they being widely different in several material points.

I am therefore of opinion, that the judgment of the District Court is erroneous, and ought to be reversed.

By the opinions of a majority of the Court, the following judgment was entered :

" This Court is of opinion, that the judgment of the District Court is erroneous in this, that the Court in-

“structed the Jury that the peaceable and uninterrupted  
 “possession, by the said *William Beasley*, of the slave in  
 “question, by virtue of a loan from *William Hurt*, which  
 “possession continued from the year 1792 until the year  
 “1801, subjected the said slave to the payment of the  
 “debts of the said *William Beasley*, by execution, in the  
 “year 1801, although *William Hurt*, the lender, died in  
 “the year 1796, after having made a will, in which he dis-  
 “posed of the said slave to the defendant, his grandson,  
 “who was under age until the year 1801; the executors  
 “named in the said will, having duly qualified under the  
 “same in *December*, 1796. The said judgment is there-  
 “fore reversed and annulled, and this Court proceeding,  
 “&c. it is ordered, that the cause be remanded to the  
 “Superior Court of ——— County, for a new trial to  
 “be had therein, with direction that no such instruction be  
 “given to the jury on such trial.”

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*Cooke against Wise.*

THIS was an action of debt for 65*l.* for one year's rent of a tenement in *Alexandria*, brought by *John Wise* against *Stephen Cooke*, in the *Hustings* Court of that town, and founded on an agreement in writing, not under seal.

Interest is not recoverable, by way of damages, in an action of debt for rent arrear.

The declaration sets forth the lease, and avers that the defendant entered in pursuance thereof, and held and occupied the premises until the expiration of the term, whereby an action accrued to the plaintiff to demand and have of the defendant the sum of *sixty five pounds*, for one year's rent, that day becoming due; and assigns for breach, that the defendant had not paid, &c. Pleas. *Owe nothing*, and *Eviction and Expulsion*; the last of which was after-

Under what circumstances a subsequent lease, made by the landlord, of demised premises in the occupation of the assignee of a residue of the term, will not be deemed an eviction of the lessee, of the lesser, original con-

nor bar the landlord from recovering of him a balance due for rent on the tract.



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wards, with consent, withdrawn, and the cause tried on the plea of *nil debet* only. Verdict for *sixty-five pounds*, the DEBT declared for, and *eight pounds, nine shillings* DAMAGES.

A bill of exceptions having been tendered, at the trial, by the defendant, the evidence on both sides was stated ; from which it appeared, that on the 3d of *October*, 1792, *Wise* leased to *Cooke* a dwelling-house, with the appurtenances, for the term of five years from the date of the lease, for which *Cooke* was to pay 115*l.* on or before the first day of *November* ensuing, which was to be in full for the first two and a half years' rent, and for the remaining two and a half years, the annual sum of 65*l.* as it became due. On the 9th of *November*, 1795, *Cooke* demised the premises, *by parol*, to *James M'Rae & Co.* until the 3d of *October*, 1797, (the end of the said *Cooke's* term,) at the rent of 120*l.* per annum. *M'Rae & Co.* entered, by virtue of the demise, and occupied the premises until the 9th day of *May*, 1797 ; and after having paid one year's rent to *Cooke*, (*viz.* 90*l.* on the 4th of *October*, 1796, for three quarters, and 30*l.* on the 21st of *January*, 1797, for one quarter,) would have been in arrears to him, on the 12th of *May*, 1797, the sum of 133 dollars, and 33 cents, if they had then settled their accounts. At the last mentioned date, *James M'Rae*, one of the firm of *M'Rae & Co.* agreed with *Wise* that he might rent the premises for the balance of their year, to any person, for any term, and upon such terms, as he might choose. *Wise* accordingly, on the same day, (the 12th of *May*, 1797, rented them to *William Groverman*, as his (*Wise's*) own property, for the term of two years, at 128*l.* per annum. Upon this demise, *Groverman* entered, and occupied the premises till after the the 3d of *October*, 1797, as tenant of *Wise*, and always considered himself as his tenant. About two months after *Groverman* took possession, *Cooke* informed him that he had a lease for the premises ; and, on *Groverman's* communicating this information to *Wise*, a few days afterwards, *Wise* told him not to mind what *Cooke* said, for that he (*Cooke*) had no right to the premises. *James M'Rae*, on

the 4th of *October*, 1797, drew an order on *Groverman*, in favour of *Cooke*, for 114 dollars, on account of rent for the house he (*Groverman*) occupied, which was in full for *Groverman's* occupation of the premises until that day, and was paid to *Cooke*, by the direction of *Wise*, and charged by *Groverman* to *Wise*, on account of rent he was to pay for the said premises. *M'Rae & Co.* never received any other rent from *Groverman*, nor paid any other part of their last year's rent to *Cooke*. After the 4th of *October*, 1797, *Cooke* made a distress on the goods of *Groverman*, then in possession, for arrears of rent due for the premises from *M'Rae & Co.* and *Wise* told *Groverman* that he would indemnify and bear him harmless against *Cooke's* claim for rent. *Groverman* sued out a writ of *replevin*, and afterwards, by mutual consent, the distress was withdrawn, *Cooke* probably being advised that he could not maintain it after the expiration of his own term.

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Upon the above facts, the defendant prayed the opinion of the Court whether the rent, for which the action was brought, was not *suspended*, and the plaintiff barred from recovering it in that action. The Court was of opinion that the rent was neither suspended, nor the plaintiff barred from the recovery of it, and gave judgment on the verdict of the jury for *sixty-five pounds*, DEBT, and *eight pounds nine shillings*, DAMAGES, together with the costs. From this judgment *Cooke* appealed to the District Court of *Dumfries*, which Court affirmed the judgment of the *Hustings* Court of *Alexandria*, and *Cooke* again appealed to this Court.

*Call* and *Wickham*, for the appellant.

*Hay*, for the appellee.

On the merits, it was contended by the appellant's counsel, that the entry of *Wise* before the expiration of the lease to *Cooke*, his renting the property as his own, and promising

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to indemnify *Groverman* against the distress made by *Cooke*, who, he said, had nothing to do with the premises, amounted to an eviction, which not only *suspended* but *extinguished* the rent ; that *Cooke* was deprived of the right of distress, for the rent due prior to the 12th of *May*, 1797, in consequence of the re-entry of *Wise*, on that day, by an agreement between *M<sup>r</sup>Rae* and him, to which *Cooke* was not privy, and by which the seisin was restored to *Wise*. If a landlord enter, with the connivance of a sub-tenant, it is an eviction ; and this action being founded on a writing not under seal, the plea of *nil debet* was proper, under which the defendant might shew in evidence any thing to prove that he was not liable.(a)

(a) 12 *Fin.*  
193. *Ibid.* 194.  
pl. 14. cites 1  
*Mod.* 118.  
*Brown's case.*  
*Ibid.* 35. *Anonymous*, S. P.  
1 *Sid.* 151.  
*Drake v.*  
*Beere*, *nota.*  
1 *Vent.* 258.  
*Anonymous*,  
S. P. in a  
*nota.*

For the appellee, it was argued, that he (*Wise*) was the mere agent of *M<sup>r</sup>Rae*, the under tenant of *Cooke* ; that *Cooke* might justly be regarded by *Wise* as his tenant for the whole term, and liable to him for the rent : that the entry of *Wise* was not tortious, but for the benefit of *Cooke*, who had made an advantageous lease of the same premises for the remainder of the term, and sanctioned the agency of *Wise*, by receiving of *Groverman*, on *M<sup>r</sup>Rae's* order, and with *Wise's* consent, the whole of the rent due from *Groverman*, at the expiration of the lease.

As to the admissibility of the evidence ; no evidence, tending to prove an eviction, ought to have been received after the plea was withdrawn, because it was a declaration to the plaintiff, that the defendant did not mean to rely on any matter of defence arising from that plea. Both on *principle* and *authority*, the defendant ought to apprize the plaintiff of the grounds of his defence ; (b) and, in reference to such cases as this, it is held, that an entry by the lessor, and an eviction by him, ought to be *pleaded*.(c)

(b) 1 *Esp. N.*  
P. 232. 235.

(c) *Corph.*  
245. per 1st.  
*Manfield*, in  
*Hunt v. Cope.*  
12 *Fin.* 161.  
pl. 4. cites  
*Owen*, 55.  
*Anonymous.*

It was no objection to the verdict, that the Jury had found the interest in damages. Although interest was not demandable, *of course*, for rent, yet the Jury might find what *damages* they pleased. Perhaps it would be otherwise before a Commissioner in Chancery.

In reply, it was said, by Wickham, that the case in *Cowper* was in *replevin*, and turned entirely upon the pleadings. The question, whether, upon the plea of *nil debet*, the defendant could give an eviction in evidence, never occurred. The plaintiff, in *replevin*, undertook to plead specially, and pleaded matter, which, upon demurrer, was held to be a mere *trespass* and not an *eviction*. *Viner*, in his 12th vol. 161. cites *Owen*, a more ancient authority than those quoted by the appellant's counsel. But the case in *Owen* might have been a demise in writing, *under seal*; in which case, it was admitted, the defendant ought to confess and avoid; and thus all the authorities would be reconciled; but this, being on an instrument, *not under seal*, was of no greater dignity than mere *parol*.

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Interest was not demandable on rents, because rent and interest were profits; and on the same principle that *interest* cannot be demanded on *interest*, so it cannot be given on *rents*.

At a subsequent day, the Court requested the counsel to examine the authorities, whether, in an action of debt for rent, the plaintiff could recover interest.

*Hay* admitted that interest on rents was not demandable as a matter of course, but might be allowed upon circumstances, in the same manner as interest upon interest might be given. In the latter case, it was discretionary with a Court of Chancery; and, in the former, if the Jury allow interest, it is presumable, that it is upon circumstances proved before them. But this being an action of debt for a specific sum, the Jury had a right to give damages for the detention; and their naked finding precluded all further inquiry. It is the invariable usage of this country to give interest upon an account for goods sold, though it is not allowed in *England*; (a) and our act of Assembly (b) recognises the principle, that interest may be allowed for rent; since it authorises the tenant to *replevy* the goods distrained, on giving bond with security, for the principal sum and

(a) 3 Will.  
205, 206.  
*Blancey &c.*  
*v. Hendrick.*  
(b) *Rev.*  
*Coile, v. L. n.*  
89. s. 1. p. 153

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interest payable at the end of three months. He cited 1 Fonb. 148. 2 Call, 249. *Graham v. Woodson*. 2 Bac. Abr. Gwil. edit. 277. tit. "DAMAGES," let. (F). 2 Com. Dig. by Rose, 547. tit. "CHANCERY," (3 S. 3.) Doug. 375. *Eddowes and another v. Hopkins, &c.*

(a) 2 Call, 257. Call, on the other side, observed, that he could add nothing to the reasons assigned by the president, in delivering the resolution of the Court, in *Skipwith v. Clinch*,(a) that the plaintiff was not entitled to interest on the arrearages of rent, because he might have distrained, and should not be permitted to lie by, and let the interest accumulate.

Thursday, March 23, 1809. The President, *pro tem.* (Judge FLEMING,) delivered the unanimous opinion of the court,(1) that the judgment be reversed, and a new trial

(1) The reporters having been favoured with a note of the opinion delivered by Judge TUCKER on the merits of this case, in the District Court, have obtained his permission to publish it.

Judge TUCKER. 1. The first point in this case seems to be, whether this *parol* demise from Cooke to M'Rae, was an *under lease* only, or an *assignment* of his whole interest therein. If it were an *assignment*, the agreement between M'Rae and the plaintiff, and the subsequent lease from the plaintiff to Groverman, would operate as a surrender of the premises to the plaintiff, and consequently discharge the defendant from any liability to him; if an *under lease* only, the act of the under tenant could not, *of itself*, affect the contract between the lessor and the lessee.

If a lessee grant to another his whole term, it seems to have been decided in a late case, (*Palmer v. Edwards*, Doug. 186. *in notes*.) that it is an assignment, although a greater rent be reserved and payable to the original lessee. But if the lessee reserve any part of the term, (even a single day,) it seems to be considered as an under lease only, and not as an assignment. (1 *Esp. N. P.* 276. 1 *Strange*, 405. *Poulteney v. Holmes*. *Douglas*, 184. *Holford v. Hatch*.)

But, in order to constitute an assignment of a lease or covenant, it seems to me to be necessary, that the assignment even of the whole term should be made by deed, or at least by an instrument in writing, and not by *parol* only. For it seems to be agreed, that wherever there is an assignment, the original lessor or lessee, or their assigns, may sue or be sued by the assignee of either, upon any of the covenants contained in the original lease. (*Douglas*, 188. *in notes*.) Now this I apprehend can never be the case unless a privity of contract be created by a written contract (at least) between the assignor and the assignee. For if possession only could charge the assignee of the original tenant,

awarded, unless the plaintiff would release the damages given by way of interest.

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how could an under tenant be distinguished from an assignee? I must presume, then, that in order to charge the tenant in possession as assignee, an assignment by deed, or some instrument in writing, at least, is necessary. On the other hand, if the tenant in possession wishes to avail himself of any of the covenants or agreements contained in the original lease, against the lessor or his assigns, he likewise must shew a deed or some instrument in writing in order to entitle himself thereto.

Objection. If the lease contain a clause of forfeiture, and re-entry by the lessor, in case some of the covenants in the lease be not duly performed, cannot the lessor enter upon the *under tenant* for the forfeiture as well as if he were an *assignee* of the whole term? Certainly. For the possession of the under tenant is by virtue of the license from the *lessee*, and is construed as *his* possession merely. But the *under tenant* of the lessee does not acquire any right under the lease to the original lessee, but the mere right of possession so long as the covenants on the part of the lessee remain unbroken, and no longer.

2. The 2d point is, whether the demise from *Cooke* to *M'Rae*, being a mere derivative lease or sub-tenancy, and not an assignment, the surrender of the possession by *M'Rae* to the plaintiff could operate as a surrender of the lease or term itself.

*M'Rae* not being restrained from demising the premises to any other person; if he thought proper, might lawfully have demised or assigned his interest in the premises to any other person whatsoever. But such demise would not have discharged *M'Rae* of his agreement with *Cooke*, nor have avoided *Wise's* lease to *Cooke*. The agreement then between *Wise* and *M'Rae*, who was a mere sub-tenant of *Cooke's*, could not of itself, in any manner affect *Cooke's* interest in the lease. The yielding up the possession to *Wise*, although *Wise* was the owner of the premises, was not of itself a surrender of the lease or term, but merely of *M'Rae's* interest therein; and, unless *Wise* did some act as against *Cooke*, which evinced his determination to enter as *landlord*, and avoid the lease to *Cooke*, his possession was to be regarded merely as the possession of *M'Rae* under *Cooke's* demise, and not as an acceptance of a surrender of the premises, and of the lease to *Cooke*. (GILB. L. of RENTS, 180, 181. cites *Ventr.* 276.) And although *Wise* did demise the premises to *Groverman* for a longer period than he was entitled to under *Cooke's* lease to *M'Rae*, and *M'Rae's* to him, yet as *Cooke* had not reserved any part of the term to himself, *Wise* might without injury to him include the whole period unexpired, in his lease to *Groverman*; for having under *M'Rae's* surrender of the possession, a lawful right to enter and hold until the full and complete end of *Cooke's* term, and the immediate reversion being in himself, he might, I apprehend, lawfully redemise the premises to *Groverman*, provided in so doing he evinced no intention to injure *Cooke* or put an end to his interest in the lease. I am therefore led to conclude that the conduct of *Wise* in taking from *M'Rae* the possession of the premises, and redemising them to *Groverman*, even for a longer period, if coupled with circumstances which repeat the conclusion that he accepted the possession as a surrender of the lease.

## Newton against Wilson.(1)

Interest is not recoverable, by way of damages, in an action of debt for rent-arrear.

In an action of debt for rent, the defendant, on the plea of *nil debet*, may give in evidence any special circumstance shewing that the rent ought to be apportioned.

A lease was made of a mill, together with a tract of land adjoining, and a black man as a miller, for a term of years, rendering an annual rent; the miller had previously to the lease been emancipated by the lessor, by a deed entered of record, and, before the expiration of the first year, left the service of the lessee. It was held that the lessee was entitled to an apportionment of the rent.

THIS was an action of debt, brought by *James Wilson* against *William Newton*, in the District Court of *Prince Edward*, in which the plaintiff declared in the *debet and detinet*, upon an agreement, (in writing, it would seem, though not so expressed, there being no *profert in curia*,) by which the defendant undertook to pay him 400 dollars, annually, for the use of his mills and two tracts of land adjoining the same, for the term of ten years, commencing, &c. together

and with a view to avoid the remainder of *Cooke's* term, is not (of itself) sufficient to discharge *Cooke* from his liability to pay the rent for the residue of the term contained in his lease.

3. Let us then examine the evidence upon this point.

*MrRae* gives *Cooke* an order on *Groverman* the day after *Cooke's* term expired for the whole rent that *Groverman* thought had then accrued; which *Groverman* (with the knowledge and by the direction of the plaintiff) paid to *Cooke* accordingly, thereby shewing that *MrRae*, *Groverman*, and the plaintiff, all admitted *Cooke* to be entitled to the rent up to the end of his term. If the plaintiff had considered the possession acquired from *MrRae* as a surrender of *Cooke's* term, would he have directed *Groverman* to pay the money? If *MrRae* had not considered himself as still *Cooke's* derivative tenant, and *Groverman* as his own sub-tenant, would he have given the order which he did upon *Groverman*? If *Groverman* had not understood from the plaintiff that *Cooke* was entitled to the rent up to the 3d of *October*, and moreover to have the payment made immediately after, would he have paid *MrRae's* order to *Cooke*? Especially at the end of less than five months, instead of the year or half year, would he have paid that order at the time he did? Certainly not. If *Cooke* had conceived himself to have been ousted by the plaintiff, would he have made the distress he did upon *Groverman*? Certainly not. It certainly, then, was understood by all parties at that time, that *Cooke's* interest in the term still subsisted; that his right to receive the rent from *MrRae* and his sub-tenant still subsisted; and consequently that his liability to *Wise* for his rent reserved, still subsisted. Upon this view of the question, I conceive we must affirm the judgment.

(1) In order to exhibit under one view the doctrine of *apportionment* of rents, and the question whether *interest*, by way of damages, could be awarded, in an action of debt for *rent-arrear*, it is deemed proper to publish this case next to that of *Cooke v. Wise*, which involves the same points, though the causes were not originally opened in that order. This arrangement, indeed, became necessary in consequence of the Court's having reconsidered the last point, in reference to both the causes.

with the miller, and stock of hogs; and the plaintiff avers, that he, being seised in fee of the mill, &c. and possessed *absolutely* of the MILLER and hogs, delivered possession thereof to the defendant; all which he accepted agreeably to the terms of the agreement aforesaid, in the nature of a lease for years, and was thereof possessed during one whole year; whereby he became indebted to the plaintiff in 400 dollars, for the rent of that year, &c. PLEA, *nil debet*, and issue thereupon: VERDICT for 368 dollars, debt, and 35 dollars and 57 cents, *damages*; and judgment accordingly.

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On the trial, the defendant tendered a bill of exceptions, stating, that *he* offered to prove that the miller was a black man, who *had been* held as a slave by the plaintiff, but was emancipated by him, *in due form of law*, two years before the date of the lease, (by a deed which is set out in *hæc verba*, and appears to have been duly recorded,) and that shortly after its commencement, and before the end of the year, the said miller *refused* to serve the defendant, and *actually left* him, and would not *return* again: which evidence the Court refused to admit; and the bill of exceptions was allowed. The defendant appealed to this Court.

Wirt, for the appellant, contended, that under the plea of *nil debet* to an action of debt for rent-arrear, any evidence is admissible which goes to extinguish the action or reduce the demand; though the old authorities say that the special matter must be pleaded. On the first point, he cited 1 *Sid.* 151. *Drake v. Beere.* 1 *Keble*, 528. 555. 1 *Med.* 35. 118. 1 *Gilb. Evid. by Loft*, 335. 1 *Esp. N. P.* 261.

The second question, whether evidence which goes to reduce the demand, be admissible, involves the inquiry, whether in an action of *debt* the rent can be apportioned. It is held, by all the books, that rent may be apportioned by act of the parties. (a)

Since, then, rent is liable to apportionment, according to the ratio of property enjoyed by the tenant, the inquiry is, whether the *form* of the action precluded the plaintiff from recovering what was really due, though more was demand-

(a) *Gilb. on Rents*, 151, 152. *Co. Lit.* 148. a. 6 *Bac. Abr. by Gwill.* 40.



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ed. 1 *Esp. N. P.* 262, 263. is explicit that it will not. And it has been expressly held, that, "when there is to be an *apportionment*, either the *Jury* shall do it upon *nil debet*, "pleaded, or the *defendant* may in his pleading set forth the "value of the land, and to what the *apportionment* shall "be." (a)

(a) 1 *Ventr.*  
276. *Hodg-*  
*kins v. Rob-*  
*son & Thorn-*  
*borow.*

It is a principle of law, that the plaintiff must shew that the defendant had the enjoyment of the property. In this case, the *miller*, who constituted the chief inducement to the lease, (which was for ten years,) was entitled to his freedom, by deed of emancipation executed by the lessor himself. It is important, then, to inquire, whether as the *miller* was lost by the act of the plaintiff, he could recover his full demand; and whether the defendant should be driven to a new action; when all the rules of law declare that such evidence shall be let in. Suppose the defendant had lost part of the *land*; the authorities are full that there should be an *apportionment*. Suppose the *mill*; it would have been the same. The same reason applies, when any beneficial part of the property is lost. And if the ends of justice can be equally attained in one action, it would be a useless thing to drive the parties to another.

It is admitted, that, *in general*, rent can issue only out of land; but it has been settled in *England*, that if a lease be made, for years, of an incorporeal inheritance, reserving rent, the reservation is good by way of *contract*; and the lessee will be liable to an action of *debt* for non-performance. (b)

(b) 6 *Bac.*  
*Abr. by Gwil.*  
9.

In another point of view this judgment appears to be erroneous. The declaration is for 400 dollars; the verdict is for 368 dollars, without finding as to the balance. The old doctrine in *England* was, that in an action of debt, the plaintiff must recover the *whole* sum demanded, or nothing. Modern determinations, indeed, admit that *part* may be found: but if the *Jury* give less than the whole demand, they must still find *upon the whole matter* put in issue, by finding *nil debet for the balance.* (c) The same principle has been

(c) 1 *Esp.*  
*N. P.* 263. 7  
*Bac. Abr. by*  
*Gwil.* 18.

settled in this Court, in other cases, though there has been no express decision, on actions of debt.(a)

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*Mr. Rac*, for the appellee. This case has been treated by *Mr. Wirt*, as if it had been an action of debt for rent, whereas, it was only an action on a contract, for the enjoyment of a mill, with the land adjoining, a miller, and stock of hogs. For the use of such property, rent cannot issue. The cases cited on the other side, therefore, do not apply to this, however applicable they may be to a reservation of rent issuing out of land.

(a) 1 Wash.  
76. *Butler v.*  
*Parks.* 2  
Wash. 301.  
*Booth's Exe-*  
*cutors v. Arm-*  
*strong.*

But, even if the defendant could have availed himself of the facts set forth in the bill of exceptions, he ought to have pleaded them specially. For the same reason that the plaintiff must state his case in the declaration, the defendant ought to apprize the plaintiff of the grounds of his defence.(b)

(b) 1 Esp.  
N. P. 35.

In all the cases referred to by *Mr. Wirt*, it appears that the special matter, which the defendant relied upon, accrued subsequent to the date of the lease. In this case, the deed of emancipation was executed about two years before the date of the contract. The deed was recorded, and it may be presumed that *Newton* had full notice that the miller was a freeman and not a slave. It may also be presumed that the miller had entered into another contract, consenting to serve *Wilson* for the term of ten years.

If the grounds of the defence had been set out by plea, it might have been in the power of the plaintiff to shew, that, by some misconduct of the defendant himself, he had been deprived of the use of the miller, and therefore was not entitled to any reparation.

But how could the defendant avail himself of this defence? It must be by way of *set-off*: and it is unnecessary to cite authorities to shew that *damages* cannot be set off. Nothing but a liquidated sum can be set off in an action of debt. The evidence thus offered, was properly rejected by the District Court.

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*Wickham*, on the same side. In the argument of this cause, the counsel on the other side set out with a *petitio principii*; he took it for granted that this was an action of debt for rent, and that rent issued out of a *slave*. 2 *Blackstone's Commentaries*, 41. lays it down as a principle, that rents issue out of *lands* only. It has been inferred from a passage in 6 *Bac. Abr.* 9. that because the lessee of an incorporeal hereditament may be liable in an action of debt, for the rent reserved, as upon a contract, that rents issue out of such property. But on turning to 2 *Saund.* by *Williams*, [304] note (12), it will be seen that the ground upon which the action was maintained, was, that that was a grant of *tithes*, which were a part of the profits of the land; that the profits of the land were considered as the land itself; and that the only difference between *tithes* and land was, that the former lay in *grant*, and the latter in *livery*.

Even if rent could issue out of *lands and slaves*, I contend that, on principle, an *eviction* cannot be *given in evidence*. The authorities cited do not support that position. 1 *Mod.* 35. and 118. only proves that the entry of the landlord is a suspension of the rent. In that case, the landlord, by his own act, *after* the commencement of the lease, deprived the tenant of the property: in the present case, the landlord has done nothing since the tenant entered on the premises.

If the tenant be *evicted* by another, who has a *prior right*, it is admitted that the landlord cannot recover the rent.

But a *mere entry* of the landlord, which amounts to a trespass only, is not sufficient to bar the recovery, though the tenant may have his remedy for the trespass. (a) If the tenant be once in possession, there must be evidence of actual eviction—of his being turned out of possession by legal process. (b) It is not pretended, in this case, that the tenant has been evicted of the *slave*. The want of *right* in the landlord is not sufficient: a title can never be drawn in question in this collateral way.

The miller was found in the condition of a *slave*; he was received as such, and never recovered his freedom by due

(a) *Comp.*  
242. *Hunt v.*  
*Cope.*

(b) 1 *Ld.*  
*Raym.* 746.  
*Chettle v.*  
*Pound.*

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course of law. The Court *must* determine on the abstract question; they *must* consider this as a complicated case. It cannot be considered as plain as if the claim to freedom was in consequence of the ancestor being free. The circumstance that the miller was emancipated by his master, makes no difference. The deed might have been forged, or delivered as an *escrow*; and the master should have had an opportunity to contest it. The policy of the law is much stronger in the case of slaves than of land: in the former case there may be fraud and collusion between the slave and the person hiring him; but in the latter, from the nature of the thing, the proceedings are more public, and there is less danger of a fraudulent recovery being permitted.

It may be argued that the slave's *going away* was equal to an eviction. But that does not determine the *right*; it was not an eviction by operation of *law*.

But it may be said, that the hire of a slave may be apportioned, if he die before the expiration of the term. I doubt the correctness of this doctrine; the case of *Overton v. Ross*<sup>(a)</sup> having settled the principle, that where there is a hiring for a year, by contract, the tenant is bound to pay, though the subject be lost. It has always been held, that neither the sickness nor running away of a slave prevented the owner from demanding the hire. There is great reason for this distinction: the tenant might be desirous to get clear of his contract, and drive the slave away; or he might be sick, and be neglected.

(a) 3 Call,  
309.

This case may be said to be different from land, because it would be cruel to insist on the tenant to try the right, in a course of law, when the man is entitled to his freedom. But let the tenant bring his action against the landlord, for hiring him a freeman as a slave; and the damages recovered may be set off against the rent. I do not contend, that if the slave be entitled to his freedom, the tenant has no remedy: all I contend for, is, that we should not be surprised by improper evidence.

Where a man rents land and a personal subject together, the rent issues wholly out of the land. No adjudged case can be found, where there has been an attempt made to

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apportion the rent on account of an eviction of the personal estate.

In *Bradby on Distresses*, p. 26, it is said to have been lately determined, that a distress will lie for rent reserved upon a lease of land with stock upon it, or for a ready furnished house, or lodgings.

But the same author lays it down as a settled principle, that in contemplation of law, the whole rent issues out of the land.(a)

(a) *Bradby*,  
*Dist. 26. 102.*

If then the rent issues wholly out of the land, unless the tenant be evicted of part of the *land*, he is not deprived of any part of the *subject*; and of course the doctrine of apportionment cannot apply. There never was an instance of a personal contract being apportioned.(b)

(b) *Brooke's*  
*Abbr. tit. AP-*  
*PORTION-*  
*MENT, pl. 7.*

This is the common case of rent of land, sale of horses, &c. in which the parties have their mutual remedies. The Court cannot go into evidence, however plain, in this collateral way. The rule of law is the same in all cases, that mutual damages cannot be set off;(c) neither will it permit either party to be surprised at the trial by improper evidence. The whole rent issuing out of the *land*, and there being no eviction of *that*, the landlord must recover; and the tenant be put to his action as to the *personalty*.

(c) *Comp.*  
*56 Howlet et*  
*al. v. Strick-*  
*land.*

As to the objection, that the Jury have found less than the plaintiff declared for, the old rule was, that the debt being an entire thing, you must recover the whole or none. But that rule has long since been exploded; and although the plaintiff must claim a sum certain, yet the defendant may reduce the demand by proving discounts.

None of the authorities cited by Mr. *Wirt*, on this last point, apply to the present case. *Hooper v. Shepherd*,(d) referred to in 1 *Esp. N. P.* 263. was a case where there were several distinct sums due. But where the debt is one and entire, and the Jury find a part, the defendant can never be called on again. The plaintiff cannot declare on a part of an entire contract, because he could not prove his contract as it existed. He must declare on the whole, in

(d) 2 *Stra.*  
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the first instance; and then he cannot declare again. *Butler v. Parks*(a) was *detinue* for several slaves: and the plaintiff might have brought several actions. So, if there be several bonds, the party may bring one action or several. In *Booth v. Armstrong*,(b) the Jury found the *debt* but not the *assets*. They were bound to find both *debt and assets*; because until assets were found, no judgment could be rendered. But *M<sup>c</sup>Murray v. Oneal*,(c) and *Smith v. Harmanson*,(d) are direct authorities in our favour.

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(a) 1 Wash.  
76.  
(b) 2 Wash.  
301.

(c) 1 Call,  
246.  
(d) 1 Wash.  
6.

If the principle contended for by Mr. *Wirt* be correct, this Court must have reversed ninety-nine out of one hundred of the judgments which have been rendered, where there was *one* cause of action, and payments have been proved by the defendant.

*Randolph*, in reply. It has been said by Mr. *M<sup>c</sup>Rue*, that this was an action on a *contract*; by Mr. *Wickham*, that it was a claim for *rent*. I will treat it as both. From the declaration it appears to be an action of debt upon *simple contract*, for a certain sum, for the use of a mill, miller, and stock of hogs. The plaintiff avers that he was seised of the land, and *possessed absolutely* of the miller, which he leased to the defendant; by *means* whereof he became liable to pay the stipulated rent.

In debt on simple contract, the plaintiff is bound to state the consideration, and to prove what he states.(e) If the declaration had not stated that the miller constituted a part of the contract, it would have been liable to an exception for that omission. The inquiry then is, whether the plaintiff *was absolutely possessed* of the miller, so as to authorise him to include him in the lease. Having so stated the fact, it was incumbent on him to prove it; and what he was bound to prove, the defendant, might, on the plea of *nil debet*, disprove.(f)

(e) 1 Esp.  
N. P. 207.

(f) *Peake's*  
*Ev.* 270, 271.

But it is contended, that if the testimony had been introduced, it would not have availed: because the miller was found in the condition of a slave, and his right to freedom could not be decided in this collateral way. The answer to

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this is, that the emancipation is stated in the bill of exceptions, and appears to be a matter of record.

Where there are mutual and independent covenants, it is admitted, that one cannot be set off against the other: but that is not the case in this action: it is a condition precedent on the part of the plaintiff. He states that he is *absolutely possessed* of the miller, when, in truth, he was a free-man.

[*Wickham*. If a man rents land to another, and covenants that he is lawfully seised, it is no defence to the tenant, that the landlord has *no title*: he must shew an *eviction*.]

*Randolph*. I am now considering this case as upon a *contract*, without regard to rent. The consideration agreed to be paid is 400 dollars, for the use of a mill, miller, &c. and that not payable till the end of the year.

But, suppose the case be considered as a question of *rent*. Upon the plea of *nil debet*, let the subject be what it may, the case is left at large. There is no distinction, nor is there any reason why there should be, whether the subject matter of the contract be land, a horse, a slave, or any thing else.

Objection. There must be an *eviction*. Here was an *eviction*; a total inability on the part of the plaintiff. If the lessee had exercised an act of ownership over this man, after discovering that he was free, he might have been sent to the penitentiary for his offence. No adjudication in *England* can apply to a case like this.

It has been admitted by Mr. *Wickham*, that, if there had been an *eviction* by a paramount title, there must have been an apportionment of the rent. Was not this an *eviction* by a paramount title? by *Wilson's* own act?

The case of *Ross v. Overton* has been supposed to be fairly analogous to this: but that case turned upon the express covenant of *Ross* to return the mill, in good repair; thus taking on himself all risks. But was that the case here?

Whether a *distress* would lie or not, in such a case as this, it is unnecessary to consider; (though it would seem from the decision quoted by *Bradby* that it would;) it is a remedy by action of debt, on simple contract, and subject to all the consequences of that action.

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Thursday, March 30. The Judges pronounced their opinions.

Judge TUCKER, (after stating the case as above,)(1) proceeded: The question upon this bill of exceptions is, how far the doctrine of apportionment applies to this particular case. It seems clear from the books, that there shall be no apportionment of a *rent-charge*, in some cases in which a *rent-service*, may be apportioned.(a) As if *A.*, having a *rent-service*, purchase part of the lands, the rent shall be apportioned: but if he had had a *rent-charge* to him and his heirs, and had purchased a part of the lands, the whole rent should have been extinguished.(b) But if the *rent-service* be indivisible, as a horse, or a hawk, there could be no apportionment; but if the lessor purchase a part, the whole was thereby extinct.(c) But, in general, a *rent-service* might be apportioned, either by a grant of a part of the reversion:(d) or, by a devise to two or more persons:(e) or by a surrender of part of the lands, or forfeiture of part:(f) or by the lessor's taking a lease of part:(g) or where a part is lost by the act of GOD; as in case of overflowing, or of wildfire:(h) or by act of the LAW; as, if a moiety of the reversion be extended by *elegit*; or dower be assigned therein; or a part of the land be *evicted* by a stranger.(i) And this apportionment shall be made by a jury;(k) and upon the plea of *nil debet*.(l)

(a) *Litt.* 5.  
s. 222. Co.  
*Litt.* 147, 148.

(b) *Ibid*

(c) *Ibid.* *Gilb.*  
*Rents*, 151.  
165.

(d) *Gilb.*  
*Rents*, 173.

(e) *Ibid.* 174.

(f) *Ibid.* 177,  
178.

(g) *Ibid.* 180.

(h) *Ibid.* 186,  
187.

(i) *Ibid.* 188.  
*Gilb. Ev.* 280.

[241.]

(k) *Gilb.*  
*Rent*, 189.

(l) *Ibid.* 189.  
*Gilb. Ev.*  
[241.] note.

But the doctrine of apportionment, as far as I can discover, does not appear to have been clearly settled, where a man makes a lease for years of land, and a stock of sheep, &c. or leases a house with the furniture in it, reserving one

(1) This opinion was adhered to by Judge Tucker in his subsequent opinion.



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(a) 2 Dyer,  
212. a.

(b) 1 Dyer,  
56. a.

entire sum of money as rent for the same. In the case of *Read v. Lownes et ux.* (a) the lessor of land and divers implements with it, entered on his lessee and made a feoffment thereof, and then the lessee re-entered; and it was held that the feoffee might bring debt for the whole rent, and that there should be no apportionment; for it was said that, although the feoffee should not have the implements, still the lessee is not disturbed in his interest in them, but shall enjoy them during the term, and then the lessor shall have them again, and there shall be no apportionment of the rent in this case, where there is no eviction of them by an elder title; but the rent above shall follow the reversion of the land, which is more worthy, and not the reversion of chattels. But the defendants brought a writ of error, and the reporter makes a *quare* of the event thereof. In *Richard le Taverner's* case, (b) a man made a lease for years of land, and of a stock of sheep, rendering a certain rent, and all the sheep died. And there were different opinions, whether, even in this case, there should be any apportionment. But it is there said it would have been otherwise, if a part had been recovered or evicted by an elder title. And with that the *Year Book*, 12 H. VIII. c. 11. pl. 5. seems to agree; for it is there said to have been agreed, that, if one make a lease of lands and goods, and the lands are recovered against him, he shall hold the goods to the end of the term, and the rent shall be apportioned. And therewith *Brooke's Air. tit. APPORTIONMENT*, pl. 24. agrees. And yet Lord Ch. Baron Gilbert puts this very case in his *Treatise on Rents*, p. 176. and says, there shall be no apportionment, but the lessee shall enjoy the goods during the term, without paying any rent.

Where authorities are uncertain and contradictory, we must have recourse to *principle* as our guide.

Lord Ch. Baron Gilbert, in his *Treatise on Rents*, p. 187, 188. says, if a lease be made of land with a stock of sheep and the sheep all die, (as in 1 Dyer, 56.) it seems doubtful whether the rent shall be apportioned, or the lessee obliged to pay the whole rent: for though it may well be presumed

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that the rent was advanced upon account of the profits which arise from the sheep, &c. yet, since the *rent* is taken to be issuing only *out of the land*, because that, in its nature immovable, is *still subject to the distress*, (which sheep are *no longer* than they are on the land,) it may be doubted whether the rent shall be abated while the tenant enjoys *all the land*, out of which the rent issues, and then adds *quare*. I confess there is nothing in this that affords any reason to my mind why the rent should not be apportioned in such a case: for though it is admitted that sheep are no longer liable to *distress* for rent, than while they are *upon* the land, yet it must also be admitted that the *land itself* is never subject to DISTRESS; to which nothing is liable but what is *upon* the land, and not the *land itself*. Besides, whatever difficulty there may be in apportioning the rent in case of a *distress* made, in such a case, a jury of farmers, in an action of debt, in the like case, would probably be able, very easily to estimate the profits which might have arisen from the stock of sheep, if they had not all died; which if it happened not through the default of the tenant, (of which the Jury were to judge from the evidence before them,) might furnish a strong argument in favour of an apportionment of the rent, though a sum in gross were reserved. The difficulty of the apportionment in this case perhaps might not be greater than where a tenant should surrender, or forfeit a *part* of the lands demised; in both which cases it is admitted there ought to be an apportionment: and that in proportion to the value of the part surrendered or forfeited, compared with the part retained, and not in proportion to the number of acres. (a) In the case before us, if the tenant had been evicted of the 200 acres of land adjoining the mill, but not of the mill itself, or *vice versa*, the rent should have been apportioned according to the *real value* of that which remained in his hands. Why might not the Jury, upon similar principles, have apportioned the loss which the tenant sustained by the departure of the miller, if he were content to have a deduction for the same made in that way, according to the value of the miller's hire,

(a) *Gillb. Rents*, 189.  
cites 1 *Ventr.* 276.

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(a) Vide 2  
Saund. 160.n.

instead of bringing a special action for damages, (as perhaps he might have done,) as well as in the other case? Such a course, if it had been permitted, would equally tend to avoid circuity of action, and multiplicity of suits. (a) And though I acknowledge that I have found no case expressly in favour of the opinion I entertain, yet on the most mature consideration, I think the evidence should have been permitted to go to the Jury.

But it was argued at the bar, that *Newton* ought to have detained the *mill* in his *service* until he had recovered his freedom by a suit.—I am of a different opinion. The *mill* having been emancipated in due form of law, and the deed of emancipation recorded, that, alone, was conclusive evidence that he was not the *SLAVE* of *Wilson*, by whom the deed was made. He would have committed a trespass; for which he ought to have been mulcted in *exemplary* damages, if he had attempted to detain a freeman as a slave, of whose freedom he had such incontrovertible evidence. The plaintiff, therefore, in my opinion, has no cause of complaint on these grounds.

There is another error, which, since the decision in *Cooke v. Wise*, must not pass over without attention. This is an action of debt for rent-arrear; and the Jury have given 35 dollars and 57 cents, *damages*, which must be by way of *interest* upon the *rent*, for no other cause of action is shewn. This therefore is error: and, for this reason as well as the former, there ought, I think, to be a new trial. There is another error which strikes me. The declaration demands 400 dollars debt. The Jury find for the plaintiff 368 dollars only, and say nothing of the residue. This error, however, being in favour of the *defendant*, he cannot have advantage of it. Perhaps the *plaintiff*, had he been so disposed, might have reversed the judgment on that ground. (b) Upon the whole, my opinion is, that there should be a new trial, with instructions to admit the evidence rejected; and that, if the Jury see cause to apportion the rent, they may do so, or otherwise in their discretion; and that no damages by way of *interest* ought to be given.

(b) 2 Stra.  
1089.

Judges ROANE and FLEMING concurred in opinion, that the judgment was erroneous in allowing damages on the rent, and that the District Court also erred in rejecting the evidence.

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Judgment reversed with costs.

The next day (*March 31*.) the above order, together with that in the case of *Cooke v. Wise*, entered Thursday, 23d of *March*, (*ante*, p. 468,) was set aside on the motion of Judge ROANE who declared himself not fully satisfied with the principle then about to be settled, and requested time for farther consideration.

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(*After reconsideration.*)

*Wednesday, May 17, 1809.* The Judges, on this day, delivered their opinions, on the question whether interest could be awarded by way of damages in an action of debt for rent-arrear.

Judge TUCKER. The question which the Court on the last day of the preceding term resolved to consider, is, whether in these cases, which were actions of debt for rent-arrear, the Jury erred in giving interest by way of damages upon the sum found to be due for rent.

This question depends partly upon the nature of the thing demanded, which is *rent*; and partly upon the nature of the action, which is brought for the recovery of it. Some consideration is also due to the nature of interest and damages, according to the principles of the common law.

Rent signifies a compensation or return; it being in the nature of an acknowledgment given for some corporeal inheritance. (a) And though, of late years, it usually consists in money, yet it did formerly, and still may consist in other things incapable of any *profit*, as spurs, capons, horses, corn, &c. or in services, or manual operations, as in doing suit at the Lord's Court, or ploughing his lands, &c. the remedy for all which, if withheld, when it ought to be paid, is by

(a) 2 *Black*  
*Com.* 41

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(a) 2 Black.  
Com. 42.

distress ; and that, of *common right*, provided the lord or lessor hath in himself the reversion, after the expiration of the lease.(a) It is unnecessary to enter into a consideration of the doctrine of distresses ; suffice it to say that the remedy was complete and in the hands of the landlord himself, if there were any thing upon the lands which might be distrained. If, by the fraud of the tenant, in *elotigning* from the lands what might be subject to distress for rent, the landlord was in danger of losing his remedy, the common law permitted him to follow the goods, if he had sight of them ; and the statute law has enlarged his remedy by authorising a distress upon goods fraudulently removed from the premises, at any time within ten days after their removal. Or, if the goods distrained were rescued, or *replevied*, the law gave him an adequate remedy for the rent-arrear, and damages for the interruption or withholding the payment. To these the action of debt was super-added in certain cases, by the common law ; and that remedy has been still further extended by statutory provisions. It is, however, proper to remark, that in all cases, as far as I can discover, where any statute has given damages, either for interruption to the common law remedy, or by way of compensation for the delay of payment of the rent, the measure of the *damages* is *fixed* by the *statute* itself. Thus, if the tenant be guilty of any pound-breach or rescous, the party grieved is entitled to recover *treble* damages : if he contests the landlord's right to distrain, by suing out a writ of *replevin*, the damages are *double* the value of the rent-arrear. But if he avails himself of the indulgence of the law, only, by giving bond and security for the payment at the end of three months, the measure of the damages cannot exceed lawful interest on the sum due, with all costs ; and this by a summary proceeding upon *ten days'* notice : the reason of which seems to be, that the remedy of the landlord is superseded by the indulgence which the law gives the tenant, upon his giving sufficient security to pay the rent in a short time ; it therefore gives interest for the *delay* of payment, *from the time that his remedy by distress has been ACTUALLY SUPERSEDED* ; that is, *from the*

DATE OF THE BOND; without regard to the period that the rent may HAVE BEEN *due*, although the distress should not have been made till the utmost period which the law allows, which is *five* years. Nor, even in such a case, could the landlord distrain for one penny beyond the rent actually in arrear. All which seems to prove that the landlord is neither by the common law, nor by any statute, entitled to interest upon rent-arrear, merely on the account of the same remaining unpaid. And there are certain principles of the common law which appear to me strongly to corroborate this conclusion. For no man shall take advantage of his own *laches* or neglect; therefore the landlord shall not have interest for rent-arrear, because he has an effectual remedy in his own hands, whenever disposed to use it. Again, the land is in law the principal debtor, and the person of the lessee is no debtor but in respect of the land. (a) Rent-service, where it consisted either in personal or manual operations, or in unproductive things, as capons, spurs, bows, shafts, roses, and other articles, enumerated by Sir *Ed. Coke*, was not of a nature to yield any profit growing out of the thing itself, in the nature of interest. And, if they happened to be *uncertain*, the lord could neither distrain nor recover *damages* for the withholding them. (b) By the common law, *interest*, under the odious name of usury, was altogether prohibited; consequently it could not be recovered in the common law courts, for the mere detention, or delay of payment of a debt, however just, or how unreasonably soever the payment might have been delayed. And, upon this principle it seems to be, that, in actions of *debt*, the damages are in general merely nominal. (c) And, even in *replevin* at common law, it would seem that the *rent* is to be regarded as the certain measure of the damages; (d) nor was the remedy, by action of debt, applicable to all cases of rent-arrear. (e) And, although the remedy by action of debt has been extended by stat. 32 H. VIII. c. 37. and subsequent statutes both here and in *England*, it seems to authorise the recovery of arrearages *only*, and not interest or damages for withholding them; for Sir *Ed. Coke* expressly tells us, for the arrearages

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(a) *Plowd.*  
71. *Co. Litt.*  
392. b. 3 *Co.*  
22. a. 10 *Co.*  
128. a.

(b) *Co. Litt.*  
96. a.

(c) 2 *Bac.*  
*Abr.* tit. DA-  
MAGES, E. &  
F.

(d) *Ibid.* F. n.  
cites 3 *Leon.*  
213.

(e) *Co. Litt.*  
162. a.

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(a) *Co. Litt.*  
162. b.

(b) *Hobart*, 82.  
207. *Plowd.*  
71.

(c) *L. V.*  
edit. 1794. c.  
30. 3 *Co. 22.*

(d) *Hobart*, 8.

(e) 1 *Wash.*  
37.

of a *nomine pænæ*, and for relief, &c. the statute gives no remedy.(a) To this we may add, that rent is regularly *demandable*, by the *payee* or landlord, *upon the lands*, (unless there be some special reservation in the lease to the contrary,) whereas, a debtor by bond or obligation, is bound to *seek* his creditor, if he means to save the forfeiture of his bond; but in the case of the *tenant*, until *demand* made, no forfeiture or penalty (although secured by a *nomine pænæ*) could be incurred; for the presumption of the common law is, that the tenant is always *upon the lands*, *ready to pay his money*, and the contrary must be *alleged* and *shewn* or no penalty is incurred.(b) And the reason for this is apparent. For the landlord may have granted the premises to another, in which case his right to the rent is gone and extinguished; and the tenant, since attornment is no longer necessary, may not know to whom to offer his rent; or he may have paid it, before notice, to his former landlord, in which case, the law acquits him from all damage.(c) Or the lessor may have granted away a part of the tenements demised to a stranger, in which case the rent must be apportioned; or the tenant may have been evicted of the lands, and so the rent utterly extinguished. Nay more, it has been resolved, "that where a rent was reserved upon a lease, and the lessee bound by obligation to pay it, although the lessee must pay it without demand, yet he is not bound to *seek* the lessor, but to render it only *upon the land*; for he has bound himself to pay it, *but still as a rent, and where the law will*."(d) So far the principles of the *common law* (and it is to be remembered we are now to decide as a court of common law) appear to me to be strongly opposed to the giving *interest* in the name of damages, in an action of *debt* for *rent-arrear*. But some cases, both in *England* and in this Court, may be supposed to militate against them. The case of *Ross v. Gill*,(e) was an action of debt in which the sum of 490*l.* was *demand*ed in the declaration for seven years' rent, at 70*l.* *per ann.* in arrear. The Jury found the debt in the declaration mentioned, and 130*l.* 16*s.* 3*d.* damages; the Court (upon what ground does not appear in the report of the case) gave judgment

for 420*l.* only, which is less than the arrears demanded. How the judgment came to be entered in that manner, I cannot conceive; but this Court seemed to think the error was in favour of the appellants and therefore affirmed the judgment. There is not a word about *interest*, either in the arguments at the bar, or in the opinion of the Court. This case, therefore, furnishes no precedent, I conceive. The subject passed utterly *sub silentio*. *Watson v. Alexander*(a) was an action of *covenant*, not *debt*. The suit was brought by the *devisee* of the lands, and not by the executors who made the lease. The breach assigned was the non-payment of nine years' rent, at 78*l.* 10*s.* *per ann.* reserved upon a lease made during the paper-money period. The Jury found a verdict for the plaintiff, and assessed his damages to 626*l.* instead of 706*l.* 10*s.* the nominal amount of the arrears demanded, subject to the opinion of the Court on a point of law, respecting the kind of money in which the rent was to have been paid. The damages, in which form alone the verdict must be rendered, are not equal to the arrears of the rent demanded. Consequently, this case, so far, furnishes no precedent. But the President, in delivering the opinion of the Court, uses an expression which carries with it a strong presumption that the opinion of the Court was, that the Jury could not have given *interest* by way of damages, if that had been (as this is) an action of *debt* instead of *covenant*: for he says, "In this case, which "is not an action of DEBT for RENT CERTAIN, but of covenant "for damages to be ascertained by a Jury, the Jury might, "upon evidence of the intention of the parties, increase or "diminish the damages; and these they might find in specie, "and so determine the question (as to the kind of money) "by a general verdict." This, I think, strongly shews the opinion of the Court as applicable to the case now before us. The case of *M'Call v. Turner*,(b) seems to me to have no particular bearing upon the present case. The Courts of the Commonwealth had been perplexed with questions concerning the recovery of debts due to *British* subjects antecedent to the war; to bring them to a point, it was recommended by the District Court of *King* and *Queen*, to the

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(a) 1 Wash.  
340.

(b) 1 Call.  
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bar, to give the notice mentioned in the report of that case, and to leave it to the Jury to decide upon the principles of common sense, and common reason, how far the absence of a creditor, who was moreover an alien enemy during the period of his absence, could be admitted as a ground of stopping the accumulation of interest during that period. This Court approved of the course recommended, and of the result. It was a case, *sui generis*, in form, though founded upon the clearest principles of moral justice ; and the sanction which it received in this Court, probably proceeded, in part, from the difficulty of bringing on the question for a judicial decision, in any way whatever. The most that can be said of that case is, that the Jury *did not* mistake the law ; it being a settled principle of the law, that where the Jury mistake the law, the verdict shall be set aside. The question now before us is, *have the Jury mistaken the law*, in giving interest by way of damages, for arrears of rent ? If they *have*, the verdict must be set aside *as against law*. For, "*ad questionem legis NON RESPONDENT JURATORES, sed Judices.*"

But it may be objected that a Jury may, and frequently do, give interest for book debts, and other simple contract debts ; and why not also for *rent-arrear* ? With respect to these, the *general* rule is, that the Jury cannot give interest, because such debts do not carry interest, by the common law : (a) but it may be payable (according to Lord Mansfield) in consequence of the *usage* of particular branches of trade, or of a *special* agreement ; or, in cases of *long delay*, under *vexatious* and *oppressive* circumstances, if a Jury, in their discretion, shall think fit to allow it. (b) So may rent secured by a *nomine pænæ*, or withheld under *vexatious* or *oppressive* circumstances, (as by a *rescue*, or writ of *replevin* falsely sued out,) even by the common law, be recovered, in an appropriate action, with recompense for the vexation, under the name of damages ; (c) but where no such circumstances, *peculiar to rents*, exist, the Jury have no right to give more than the *rent-arrear*, especially in an action of debt, where the plaintiff is to recover *in numero*, and where damages are, almost always, if not altogether, nominal only.

(a) *Blancy v. Hendrick*, 3 *Wilson*, 205.  
2 *W. Bl.* 701.  
S. C. 1 *Esp.* 170. 2 *Bro. Ch.* 3. *Bodham v. Ryley*. 2 *Call.* 358.  
*McConnico, &c. v. Curzen*. *Ibid.* 420.  
*Deans v. Scriba*.  
(b) *Edlows v. Hopkins*, *Doug.* 361.  
(c) 3 *Leon*. 213. cited in 1 *H. Bl.* 542.

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(a) Lord  
Lonsdale v.  
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R. 388.

(b) Wilde  
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6 T. R. 303.  
M<sup>r</sup> Chure v.  
Derkin, 1  
East, 436.

Mosby v.  
Johnson, in  
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Oct. 16, 1787.  
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fing, 1 Call,  
336. same  
principle.

(c) 2 Saund.  
107. 7 T. R.  
446.

(d) Doug.  
40.

(e) 2 Fent.  
437. b. 4. e.  
1. s. 2.

(f) 3 Bro.  
Ch. Rep. 492.  
496.

(g) 2 Atk.  
110.

(h) Ibid.  
440.

(i) 4 Ves.  
jr. 816.

(k) 3 Vet.  
jr. 135.

(l) 2 Bro.  
Ch. Rep. 2.

(m) 1 P. Wms.  
653.

And although in one case, (a) it was held that, in an action of debt on a bond, damages may be recovered for more than the amount of the penalty, yet the resolution in that case has been overruled. (b) It is true, interest by way of damages, is given in actions of debt upon judgments; (c) but there the debt is liquidated by a judgment, and interest is given *ratione detentionis debiti*. In *White v. Sealey*, (d) it was decided that, in an action of debt on a bond for the payment of rent, damages could not be recovered beyond the penalty, though the rent-arrear exceeded it. The rule in equity is, that the Court regards the penalty of the bond as the extent of the debt, (e) and though there seems to be some contrariety in the cases on that subject, later decisions seem to concur in this rule. (f) In *Lloyd v. Williams*, (g) Lord Hardwicke said, a debt by simple contract does not carry interest in its nature, nor would that Court decree it to be paid; nor is there any general rule that simple contract debts shall carry interest, even where a trust is created for payment of debts generally. And in *Ryces v. Coleman*, (h) he denied interest on a simple contract debt. So in *Tait v. Lord Northwick*, (i) where a provision was made by will for payment of interest of debts, it was held the provision did not extend to simple contract debts. In *Parker v. Hutchinson*, (k) it was said by the Master of the Rolls, that the Courts of Law do not permit interest to be given by way of damages, upon notes payable at a day uncertain, or shop debts. In *Boddam v. Ryley*, (l) where interest was claimed upon the balance of an account, Lord Thurlow observed, if, according to the argument of the party claiming it, whatever in fact appears to be due on the balance of an account, (where there had been no settlement, or acknowledgment by the debtor, which raises a contract to pay, and which is the only ground upon which interest is given, (m) shall carry interest, the rule must go to every debt for goods sold and delivered, which certainly is not the law of England.

As to interest on arrears of an annuity, which comes nearer to the case of rent-arrear than any other, the Courts

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(a) 1 P.Wms.  
542.

(b) 1 Ves. 428.

(c) 3 Atk.  
579.

(d) 2 Atk.  
211.

(e) 2 Ves. 170.

(f) 2 P.  
Wms. 163.

(g) 2 Atk.  
411.

(h) 2 Ves.  
jr. 157. 4 Bro.  
Ch. 316. S.  
C.

(i) 3 Bro. Ch.  
Rep. 489. 1  
Ves. jr. 451.  
S. C.

(k) 4 Bro.  
Ch. 321.

of Equity have in some instances given it; as in *Litton v. Litton*.(a) In that case it was said *arguendo*, and not denied, that, if an action of *debt* had been brought for the annuity, the plaintiff could not, at *law*, have recovered interest upon the arrears: it was given on the particular circumstances of that case. So in *Stapleton v. Conway*.(b) In *Newman v. Auldin*.(c) interest was allowed on a life annuity, secured by bond, in a penalty of 500*l*. In the *Drapers' Company v. Davis*.(d) interest was allowed only from the time the Master's report was confirmed. The annuitant in that case had been dead seventeen years before that time. In *Morris v. Dillingham*.(e) it is said, the giving interest for *arrears* of an annuity is discretionary; and in *Batten v. Earnley*.(f) it is said, interest is only allowed where there are *great* arrears, and not for small sums. In that case three years annuity was in arrear. In Sir *John Robinson v. Cuming*.(g) there was a grant of an annuity by way of mortgage, with a power to *enter* in case of arrears, and to hold until satisfied. Lord *Hardwicke* said, there is no instance where the Court has ever allowed interest on the arrears of *such* an annuity. In *Creuse v. Hunter*.(h) interest was not allowed on arrears of an annuity in lieu of dower. And in *Tew v. Earl of Winterton*.(i) it was *not* allowed, although *secured by bond* and in *bar* of dower, and out of *productive* estates. In the case of *The Society for Propagating the Gospel v. Jackson*.(k) Lord *Thurlow* refused interest on arrears of an annuity, though the funds were productive. But what was said by Lord Chancellor *Talbot*, in *Ferrers v. Ferrers*, comes nearer to the present subject than any other cases. "The arrears of an annuity or *rent* charge, says his Lordship, are never decreed to be paid with interest, but where the sum is *certain* and *fixed*, and also where there is a *nomine pænæ*, or some *penalty* upon the grantor, which he *must undergo*, if the grantee sued at law, and which would oblige him to come into equity for relief, which the Court will not grant, but upon equal terms, and there can be no other but decreeing the grant-  
" or to pay the arrears, with interest for the time, during  
" which the payment was withheld. *But interest for the*

"rents and profits of an estate was NEVER DECREED YET,  
"the sum being entirely uncertain."(a)

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We come now to the cases in this Court. In *Graham v. Woodson*, (b) interest was allowed by the High Court of Chancery on the rents in arrear, and that case was affirmed in this Court. But there the Court evidently proceeded upon the ground of the unconscientious conduct of the defendant, *Graham*, "in endeavouring to defeat the rents altogether," by first purchasing the reversion at an under rate, and then surrendering the lease, and thereby delaying the payment. The plaintiffs were infants: they had no power to distrain, the reversion being granted away to another. And if they had had such power, it is highly presumable from the answer that there was no distress upon the premises, until *Graham* had surrendered the lease, as he declined working the coal pits for some time. These circumstances present a very different case from that before us. But in *Skipwith v. Clinch*, (c) the same term, the Court said the plaintiff was not entitled to interest on the rents, (although near twenty years' rents appear to have been due,) because it was certain he might have distrained; and therefore should not have lain by and suffered the interest to accumulate; and if it was uncertain, the cases relied on by the plaintiff's counsel shewed interest is not demandable. This latter reason applies with peculiar force to the case of *Newton v. Wilson*. For the amount of the rent due was altogether uncertain, rendered so by the departure of the miller and the apportionment of the rent, to which the lessee was entitled, in consequence of that event, and the fraudulent conduct of the lessor, in imposing him upon the lessee as a slave. The Jury gave less than the sum demanded for rent, *in numero*, and yet gave damages more than equal to the apportionment, if in fact the defalcation from the amount of rent demanded was made on that account. So that they actually mulct the defendant, in damages, at the same moment that their verdict proves they thought him entitled to an abatement of the rent, or rather, to damages for the injury and imposition he had sustained. A solecism not to be supported,

(a) *CLARKS*  
*temp. Talbot,*  
23.  
(b) 2 *Call,*  
219.

(c) 2 *Call,*  
257.

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In the case of *Cooke v. Wise*, if the latter was disabled from distraining for the rent-arrear, at any time during the continuance of *Cooke's* possession, or that of his under-tenants, it was by his own conduct altogether. He, therefore, has not a right to interest for arrears, which, but for his own want of judgment, he might have distrained for.

Judge ROANE. In these two cases in which judgments were rendered by this Court at the last term, it occurred to me, towards the close thereof, that the Court had committed an error touching the point of *interest*. I mentioned this idea to the Judges in conference, and they agreed to rescind the judgments, and continue the cases until the present term, for reconsideration and revision. I have no wish to vary or depart from the decisions then given, on any other part of the cases: I adopt them as for my present opinion; but, touching the point of *interest*, I am, on reflection, confirmed in the opinion that the judgments were, in both cases, erroneous.

In the case of *Cooke v. Wise*, (which was an action of debt for rent.) this Court *reversed* a judgment of the District Court, affirming one of the *Hustings* Court, (although the Judges were unanimously of opinion, that the judgment was correct on its merits,) because that judgment "allowed" interest, by way of damages, on the amount of the rent due, "inasmuch as the appellee had remedy by distress, if he had" not deprived himself thereof by his own act." And in the case of *Newton v. Wilson*, which was also debt for rent, this Court reversed the judgment of the District Court on two grounds; one of which was, for that "interest was given" by way of damages for detention of the debt;" and, in its instruction to the District Court, upon the new trial, directed that "*no interest should be allowed by way of damages,*" on the sum to be found due for rent as aforesaid.

As the records on which these opinions were delivered, have shewn no *special* reasons why interest should *not* have been allowed by the Juries respectively; I understand these

decisions to go the full length of affirming that interest for rent is not to be allowed by a Jury in *any* case whatsoever ; the instruction in the *last* case being, that " no interest \* should be allowed by way of damages," I presume, under any circumstances ; and this is the proposition which I mean to combat.

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I will begin by saying that *interest* is nothing more than *damages* ; and that damages are peculiarly within the province of a Jury to find or not. In 2 *Fonb.* 423. it is said, that " since a man is bound in equity not only to perform " his engagements, but also to repair all *damages* that naturally accrue from the breach of them, we ought not to " omit treating of these, and especially of INTEREST, which " is most frequent of all, it being *the common measure*, " where the contract is for money ; though, in its own " nature, more uncertain than any other. But it is now " fixed to a certain portion of the sum lent ; for, to cut off " the infinite variety of liquidations and law suits which " might be occasioned by the non-payment of money, it was " absolutely necessary to settle, by a law, a uniform reparation for all the sorts of *damages* arising thence," &c. and that these DAMAGES could " not be made more just or " certain, than by fixing at the value of the common profits " that may be made of money by a lawful commerce."

It is in pursuance of this same idea that when the statute of 3 *Hen. VII. c. 10.* declares that, on a writ of error, the person against whom it is sued out, " shall recover his " costs, and *damage* for his delay and wrongful vexation in " the same, by discretion of the Justice afore whom the " said writ of error is sued," the Court of King's Bench adopted *interest* as the measure of the *damage*, "*the action being for a debt.*" (a) The same idea was held by this Court in the case of *Asberry v. Calloway*, 1 *Wash.* 74. in which 20 *per cent.* given against Sheriffs in a certain case, by act of Assembly, was considered by the Court as *damages*, though, in the act itself, called "*interest.*"

(a) See  
*Doug.* 752.  
*Zink v. Lang-*  
*ton*, note 3.

*Interest* then is but a fixed measure of *damages* ; and damages are defined to be a compensation given by a *Jury*

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(a) 2 *Hac.*  
*Abr. Gwil.*  
edit. 263.

(b) 2 *Bl.*  
*Com.* 9.

(c) *Rev.*  
*Code,* v. 1.  
p. 153.

for an injury or wrong done the party before action brought: (a) now if rent is *due* at the end of the year, and is not *then* paid, an injury is done to the landlord, by holding and making a profit on *his* money, which ought to be recompensed in damages.

*Anciently*, distresses were looked upon in no other light than a pledge or security for the payment of rent, but have *latterly* been improved into a more direct mean of compelling payment. (b) As under the *former* idea a sale for payment of rent could not be effected by distress, but only by an action; in which case, I presume, it would be admitted, that damages might be recovered. The question is, whether the right to damages or interest is taken away by the addition of a *new* remedy, by the conversion of the ancient *distress* into a *mean* or action for enforcing payment also? Let the various instances, to be found in our code, in which a *new* and summary remedy is superadded to the old, and yet does not impair the rights existing under it, answer the question. And *if*, in the case of a distress, whether the property be *replevied* by the tenant, or *sold* by the officer, the principal sum is to be paid WITH INTEREST, (b) *cui bono*, shall we say that interest is not to be given in the case of an action? If, in whatever way a *distress* shall eventuate, under our act, *interest* is to be given upon the sum due for rent, is it not too much to say, that, in the *concurrent* remedy by action, *interest* is under *no* circumstances to be given? And if, in the *former* case, interest is to be given under *all circumstances*, why not permit a Jury to judge of it in the *latter*, and give or withhold the interest or *damages*, as to them may appear right and proper? Certainly this *last* construction is most beneficial for the tenant, as it gives him a chance, under circumstances, to be exempted from the payment of interest; whereas, under the other idea, the landlord will be compelled, by a just attention to his own interest to distrain *immediately*, in all cases, under pain of losing the *interest* on his money. That distress, which was anciently only a *pledge*, and is now exalted into a *concurrent* mode of enforcing payment, will

be made, by this construction, to overthrow and supersede the remedy by action altogether, and subject the tenant in all cases to the more rigorous remedy by distress.

*Interest* on money being then neither more nor less than *damages*, as is before said, I hazard little in saying that the power of a Jury, in relation thereto, is, at least, as great as that of a Court of Chancery.

In 4 *Vin.* 402. it is said, that, as a Court of Chancery cannot settle *damages*, a breach of covenant must be tried *at law*. In *Cud v. Rutter*,<sup>(a)</sup> which was a bill on a contract for stock for a specific performance of the contract, the Court dismissed the bill, and would neither decree performance nor the difference money in *damages*, saying, that the complainant should recover his *damages at law*, wherewith he might buy the stock. In the case of *Buxton v. Lister*,<sup>(b)</sup> in which the last case is recognised, the Court said, in a similar case, that the proper remedy was *at law*, where the complainant might recover *damages* for the non-performance of the agreement. Various cases might also be readily added in which a Court of Equity, proceeding upon the same idea, have referred the case on the point of *damages* to a Court of Law, to settle on an issue of *quantum damnificatus*. So, in this Court, in the case of *Eustace v. Gaskins*,<sup>(c)</sup> which was a decree for land and back rents, this Court reversed it, on the ground that the value and profits of the land, which were *in the nature of damages*, were ascertained by commissioners of the Court of Chancery instead of a *Jury*, and directed an *issue* for that purpose.

These cases shew that a jury is, at least, as proper a tribunal to decide on *interest* (or *damages*) as a Court of Chancery. But the Jury is also more competent on this subject than even the Court of Law before which it carries on its inquiry. In the case of *M<sup>c</sup>Call v. Turner*,<sup>(d)</sup> Judge *Pendleton* said, referring to an opinion of Chief Justice *Jay*, that he was mistaken in saying that *interest* was a *question of law*; that *Jay* himself had at length admitted that the Jury might decide *both the law and fact* of the case, comprehending the question of *interest*; and that he (Mr. *Pen-*

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(a) 1 *P. Wms.*  
572.

(b) 3 *Atk.*  
383.

(c) 1 *Wash.*  
190.

(d) 1 *Call,*  
146.



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dleton) thought it proper for the *Jury* to decide *what interest*, as well as principal, was due. Judge *Fleming*, in the same case, admitted it was the province of the *Jury* to decide *what interest* was due; and Judge *Carrington* gave into the same idea.

In the case of *Eddowes v. Hopkins, &c.* executors of *Harris*,<sup>(a)</sup> it was decided that, although, "by the common law, book debts do not, of course, carry interest, it may be payable *by the usage* of particular branches of trade, or by a *special agreement*, or in cases of long delay, under vexatious and oppressive circumstances, if a *Jury*, in **THEIR DISCRETION**, think proper to allow it." How do we know, under the general verdicts in the cases in question, that circumstances similar to the above did not exist, and were proved to the *Juries* respectively, justifying the giving interest in these particular cases, although it were to be admitted that, *in general, interest on rents* is not allowable. Many other cases to the above purport might be readily cited, but I think it unnecessary to quote them.

Having shewn, I trust, that the power of a *Jury* on the subject of *damages* generally, (and, in particular, on the subject of *interest*, which is a question of fact and not of law as aforesaid,) is not only equal, if not paramount, to that of a Court of Equity, but even to that of the *Court* of Law, I proceed to say, (*in general*,) that a Court of Chancery (*in its discretion*) allows interest on *rents*. In the view I take of the case, I need not be very minute and particular on this point; but in the case of *Graham v. Woodson*,<sup>(b)</sup> this Court *did* give interest on *rents* under a power said to be discretionary, and under circumstances which appeared to the Chancery (as they may have done to the *Juries* in question) to make it reasonable: on the other hand, in the case of *Skipwith v. Clinch*,<sup>(c)</sup> interest on *rents* was *refused*. These cases, without resorting to any others, shew incontestibly, that the Court of Chancery, in its discretion, and under circumstances, may give or refuse interest; and this is a power which belongs, I think, *a fortiori* to a *Jury*. In the exercise of this power by the Court of Chancery,

<sup>(b)</sup> 1 *Call*,  
253.

<sup>(c)</sup> *Ibid.* 257.

(which combines the functions of the Court and Jury,) it is as the *Jury* that the Court acts upon the facts and circumstances ; and these belong to a Jury, at least as clearly, in a jurisdiction in which the proper functions of the Court and Jury are kept separate.

But it is said that interest ought not to be given, because rents were "*anciently* payable in spurs, capons, &c. which "yield no profit." It is not denied that this was anciently the case ; but the true idea of rent is, that it issues *out of* the land demised : *reddendo inde* is the usual form of reservation, and rent is *naturally* a part of the crops made upon the land itself. But even the detaining of spurs, capons, or a horse, while such detainer is profitable to the tenant, is injurious to the landlord ; and this is the true ground of giving damages by a Jury. If, however, such detainer be not profitable to the one, nor injurious to the other, the Jury, in their discretionary power, will refuse compensation. The case before us is, however, of rent due *in money*, the use of which is certainly equal to the interest.

It is a general and true maxim that the uniform forms of pleading and declaring are good evidence of the law. In *Lilly's Practical Register*, p. 185. in a declaration for rent in a lease at will for 50*l.* damages are laid at 50*l.* *Ibid.* p. 179. in a declaration for 80*l.* rent, damages were laid at 100*l.* *Ibid.* p. 168. debt for rent 280*l.* damages 100*l.* *Ibid.* p. 163. debt for rent 30*l.* damages 60*l.* I might increase this list to any extent, but it is unnecessary. I cannot, however, forbear to remark that the magnitude of the sums laid in these cases for *damages*, compared with the sums sued for, respectively, as rent, reprobates the idea that no *interest* was to be recovered in those actions.

But wherefore pursue this case on general reasoning? In the case of *Ross v. Gill*, (a) which was debt for rent, the declaration demanded 490*l.* for rent, and damages were laid at the enormous sum of 800*l.* thereby disclaiming the idea, so far as the opinion of the drawer of the declaration can operate, that interest (or *damage*) was not recoverable in an

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(a) 1 Wall.  
87.

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action of debt for rent. The Jury found for the plaintiff 490*l.* to be discharged by 420*l.* and assessed his damages at 130*l.* 16*s.* 3*d.* and judgment was rendered for 420*l.* and the DAMAGES found as *aforesaid*. Now, although these damages bore so great a proportion to the principal sum, and the case was twice argued, as appears from the record, and was much contested on various grounds, both by the bar and bench, the objection to the *damages* was never taken, or even glanced at by ei.her.

This authority would seem to conclude the present question. There is, however, one idea entertained on this subject, which requires further consideration. It is, that, although the Jury has, under some circumstances, (though not in general,) a right to give interest in the case of rents, it ought to appear to the Court that they rightly gave it in the particular case. What is this but to deprive the Jury of the right to decide upon the whole question of law and fact, which they have an undoubted right to do; (a) and which even Chief Justice Jay, in the famous case of the *British debts*, *eager* as he was to give the whole war interest, was not hardy enough to deny them? What is it but to cut up by the roots the power of the Jury to find a *general* verdict, and compel the *Jury* to submit to the Court, in the form of a *special* verdict, a question justly disclaimed by Judge Pendleton as belonging to the *Court* in the *aforesaid* case of *M'Call v. Turner*? What is it but to presume, in the case of a *general* verdict, (like those before us,) that the Jury *has transcended* its powers, in a case confessedly within its cognisance, and to warrant which presumption there is no fact stated or shewn to the Court, either by the parties or the Jury? On the contrary, I take the true doctrine to be, that the Court will never entertain a doubt concerning any thing which is not submitted to their consideration by a *special* verdict; but will, on the other hand, intend every thing which can be fairly intended, in order to support the verdict. (b) They should, in the case before us, if the Jury had cognisance of the subject, under *any* facts or circumstances, intend that such facts or circumstances appeared

(a) 3 Bl. 377.  
7 Bac. Abr.  
3.

(b) 7 Bac.  
Abr. 7.

to the Jury on the trial ; and should, on that ground, sustain the verdict.

The result of my reflection on the cases before us is, that, in the case of *Cooke v. Wise*, the judgment of the District Court, affirming that of the *Hustings* Court, ought to be wholly affirmed ; and that in the case of *Newton v. Wilson*, although the judgment ought to be reversed, on the other ground assigned by the Court on the former occasion, it ought not to be reversed on the ground " that interest was " given by way of damages for the detention of the debt ; " nor ought there to be any instruction given by the Court below, upon the new trial to be awarded, " that no interest " should be allowed by way of damages, on the sum to be " found due for the rent as aforesaid."

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Judge FLEMING. This case of *Cooke v. Wise*, has been so thoroughly investigated, and so fully stated by the other Judges, that it seems unnecessary for me to add any thing *particular* on the subject ; and I shall only observe that it is laid down as a *general* principle, that, in an action of *debt* for *rent*, interest on the sum due is not demandable, because, say the books, the landlord has his remedy in a summary way, by distress ; and in the case of *Skipwith v. Clinch*, in this Court, interest was denied, although the rent had been 20 years due ; because there was, on the leased estate, abundant property of the tenant, whereof distress might have been made.(a) And that case was reviewed, and approved of at the next succeeding term, in the case of *Deans v. Scriba*.(b) And, to take a case out of the *general* rule there must appear, I conceive, some misconduct of the tenant, or some *special* circumstance, to subject him to the payment of such interest ; and, as nothing of the kind appears in the case before us, I must, after mature reconsideration, adhere to my former opinion, that the judgment be reversed.

(a) 2 Call,  
253.

(b) 2 Call,  
419.

In the case of *NEWTON v. WILSON*, there are stronger reasons, why interest should not have been recovered ; to

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wit, the deceptive conduct of *Wilson*, in making the contract with *Newton*; I am therefore still of opinion, that that judgment should also be reversed, which is the unanimous opinion of the Court, though on a different ground by one of the Judges.

*Wednesday, May 17th.* Final judgments were given in both causes.

In the case of *Cooke v. Wise*, the entry was, "that the judgment of the District Court be reversed; that the judgment of the *Hustings* Court was correct on its merits, but that there is error in allowing interest by way of damages, on the amount of the rent due, inasmuch as the plaintiff, now appellee, as a landlord, had his remedy by distress, if he had not deprived himself of such remedy by his own act;" therefore, &c. that judgment to be also reversed, and the cause to be "sent to the Superior Court of Law, directed to be held in *Fairfax* County, for that Court to set aside the Jury's verdict, and to award a new trial of the issue, unless the appellee shall release the damages assessed by the Jury, and consent to take a judgment for the debt found by the verdict to be due to him, and pay the defendant, now appellant, his costs, expended by him in the said *Hustings* Court."

In *Newton v. Wilson*, the following entry was made: "that the judgment of the District Court was erroneous, in this, that the Court refused to permit the defendant's, now appellant's, evidence to prove that the miller in the declaration mentioned, is a black man, who had been held as a slave, by the plaintiff, now appellee, and that he, by deed bearing date the 14th of *March*, 1800, and recorded in the County Court of *Buckingham*, had actually emancipated the said slave, and that the said miller, so emancipated, shortly after the commencement of the said lease, and before the expiration of the first year, refused to serve the appellant, and actually left his employment,

"and would not return to it again ; and also in giving judgment for interest assessed by the Jury, by way of damages for the detention of the said debt." Judgment reversed ; verdict set aside ; and a new trial awarded ; with instruction "that the defendant, now appellant, is to be allowed to give any special matter in evidence, respecting the said miller," &c. and that "no interest is to be allowed by way of damages, on the sum to be found due for the rent.

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NOTE. On the point of the *apportionment* of the rent, the Judges were unanimous ; but on the question of *interest* for rent-arrear, Judge *Roane* dissented.

*Scott against Adams.*

*Saturday,*  
*April 29th,*  
1809.

THIS appeal was docketed in *October*, 1804, and was from a judgment on a forthcoming bond.

The appellee being dead, and no appearance having been entered for him or his representatives, *George K. Taylor* moved to take up the cause as a delay case, in the name of the executors, and have the judgment affirmed.

But, *by the whole Court*, the case comes within the reason of the rule adopted at the *October* term, 1808, (a) which allows one term after new parties made, to prepare for trial. Besides, from the length of time which has elapsed since the appeal was prayed, without any steps having been taken by the appellee, or his representatives, it is possible that the debt may have been paid by the appellant.

Motion to take up the appeal denied ; and *scire facias*, to revive, in the name of the executors of the appellee awarded.

Construction of the rule, as to allowing one term to prepare for trial, after new parties are made.

Where the appellee dies, the Court will not take up the appeal, in the name of his executors, without giving the appellant notice of a *scire facias* ; especially where a great length of time has elapsed since the appeal.

(a) See *ante*, p. 276.

Same day.

## Palmer &amp; Eubank against Mill.

If the damages be laid high enough in the writ, though the Jury find more than are laid in the declaration, the writ may be referred to for the purpose of amendment, and the judgment will be sustained.

(a) *May*, 1806. MS. and see 2 *Hen. & Munf.* 457. where the same case is referred to by Judge TUCKER, in giving his opinion in the case of *Craghill and others v. Page*, Gov. &c.

AN appeal from a judgment of the District Court, held at King and Queen Court-House.

The appellee brought an action on the case, against the appellants, (who were joint owners of a schooner,) as common carriers, for a quantity of wheat damaged on board their vessel, on the voyage from *Virginia* to *Baltimore* in *Maryland*. The damages were laid in the writ, at 2,500 dollars, but in the declaration, at 250 dollars only. Verdict for 359l. 10s. damages, and 28l. 10s. 8d. interest, and judgment accordingly.

On the authority of the case of *Hook v. Turnbull*, (a) it was held that the writ might be referred to for the purpose of amendment; and the damages laid therein being sufficiently large, judgment was AFFIRMED by the whole Court.

*Wickham*, for the appellee.

## Bates against Holman, Executor of Bates.

A testator made a will, in due form of law, to which he afterwards subjoined a codicil: he then made a second will, and annexed a postscript to it, by which he

CHARLES FLEMING BATES, attorney at law, at that time an unmarried man, on the 16th of *November*, 1799, made the following will: "It is the earnest request of C. F. Bates, that *George Holman* (his most particular friend) will take upon himself the burden of the execution of this instrument, which is intended for the last will and testa-

revoked all former wills," and signed the postscript; the second will was cancelled by cutting his name out from the body of it, but leaving the postscript with his name subjoined to it. This paper was carefully preserved by the testator, as also his first will; both of which were found after his death; held that the postscript to the second will was a substantive revocation of the first will, and that the cancelling of the second will did not necessarily cancel the postscript also, so as to set up the first, as the will of the testator.

Parol evidence is admissible in such cases, to shew the situation of the testator, and *quæritur*, the cancellation was made.

"ment of the subscriber, and that he will hold all the property of which the subscriber may die possessed, and not otherwise disposed of, in trust for the benefit of the family of *Thomas F. Bates*, and principally for the benefit of *Caroline M. Bates*, and under her own free and particular control, so long as she continues the wife or widow of the said *Thomas F. Bates*; and if she should marry again, and be in need of any thing, then to such proportion as the said trustee in his judgment shall think right, not exceeding one-third of the estate of the subscriber; and at the death or marriage of the said *Caroline*, the unappropriated remnant, if any, to—equally among the children of *Thomas F. Bates*, except that *Isaac*, my slave, shall be free, at all events, at twenty-one years of age; and my slave *Charlotte* shall also be free at eighteen years of age. And if *George Holman* carry this into effect, he shall use his discretion as to the mode of making the estate command the greatest value, and shall have ten per centum for his trouble. In testimony whereof I, *Charles F. Bates*, have hereunto affixed my name and seal, at *Belmont*, this sixteenth day of *November*, one thousand seven hundred and ninety-nine.

(SEAL.)

"*Ch. F. Bates.*"

On the 23d of *September*, 1801, he annexed a codicil to the above will, in the following words:

"Codicil.

"I wish the balance of the purchase money of *Belmont* to be raised by my said executor, as soon as possible, from the debts due me, and a title made to my said executor, as trustee, in like manner as of the personal estate; and, as to *Isaac* and *Charlotte*, I revoke to, pre-  
ceding part of my will, but not as to any thing else.

"*September* 23d, 1801.

(SEAL.)

"*Ch. F. Bates.*"

On the 2d of *September*, 1803, he made another will, as follows:

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"The last will and testament of *Ch. F. Bates*, written with his own hand, at *Richmond*, the second day, of *September*, 1803."

"My most ardent wish is to render my mother happy and easy during life ; also my father, and all his children, as long as they or any of them continue in his family, remain single, or, in the discretion of my executor, shall need assistance ; for effecting which purpose, I appoint my executor trustee of all my estate, both real and personal, to manage at his discretion, in such manner as he think best ; but not to be at liberty to sell my real property, or any part thereof. I desire all debts which appear due by my books to be paid, and no others, unless proved by law. After the death of my father and mother, and the arrival to age of twenty-one years of my brother *Edward*, whichever shall happen last, I desire the whole of my estate not otherwise particular\*\*\*\*\*sed,(1) to go to my brothers and \*\*\*\*\*,(2) equal proportions, and if any be dead, to the proper heirs of the deceased. I desire that *Edward Bates* be schooled at my expense, and brought up at the discretion of my father, on my estate. I give my two sisters, *Anna* and *Caroline Matilda*, one hundred dollars each, to be paid as soon as my executor shall be able to pay it, without injury to my creditors. If my sister *Margaret* shall be single at my death, or married to a man worth less than three thousand dollars, I give her one hundred dollars, to be paid as soon as possible.

"I have a daughter called *Clemensa*, at *Walter Keeble's*, in *Cumberland*, I declare her to be free to every right and privilege which she can enjoy by the laws of *Virginia*. I most particularly direct, that she be educated in the best manner that ladies are educated in *Virginia*. I give

(1) The letters wanting are "ly dispo." They were cancelled, by cutting out the name of the testator on the opposite side of the will.

(2) The words "sisters in," are supposed to have been originally inserted, but cut out, by the same act which produced the obliteration above mentioned.

" her my lot in the town of *Cartersville*, and three hundred  
" dollars, to be laid out at interest, renewed yearly, and paid  
" when she marry or come of age. I appoint *George Hol-*  
" *man* my sole executor, and I trust he will not refuse to  
" act.

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" I revoke all other wills  
" heretofore made by me.

" *C. F. Bates.*"

[*Here the testator's name was cut out, nearly in the shape  
of a coffin, leaving some parts of the letters visible.*]

These two wills, and the codicil to the first, were proven  
to have been wholly in the hand-writing of the testator.

The first will and codicil was folded up in the form of a  
letter, sealed with three seals, and addressed to "*Caroline*  
" *M. Bates*," which was the name of the testator's mother,  
with whom it was deposited.

The second will was folded up and indorsed "*C. F.*  
" *Bates's will*," and was laid away smoothly in a small box,  
with other papers, and curious pieces of coin, and deposited  
in a trunk.

Both the superscription on the first will, and the indorse-  
ment on the second, was written by the testator.

The *first* will was written on a sheet of letter paper, and  
the whole of it is contained on the first page, except the  
words "trouble. In testimony whereof I, *Ch. F. Bates*,  
" have hereunto affixed my name and seal, at *Belmont*, this  
" *sixteenth day of November*," &c. After which follows  
the codicil, as above inserted, which does not occupy the  
whole of the second page.

The *second* or *cancelled* will was written on *half* a sheet  
of letter paper, folded so as to form four pages of equal  
size. The will occupies the whole of the first and second  
pages, and concludes so near the bottom of the second page  
that there is not more than room enough to write the name  
of the testator, and the *postscript*; which last appears to be  
written with rather a smaller hand, and with the lines clo-  
ser together, than the body of the will. The will and the

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postscript seem to be written with the same *pen* and *ink*. In cutting out the name of the testator, the letters and words which occupied the places in the original on the opposite side of the paper, now marked with stars, were also cut out.

The *first* will, with the codicil annexed, was offered for probate in the District Court of *Richmond*, by *George Holman*, the executor therein named; which was opposed by *Mary Heath Bates*, widow of the testator, who produced the *second* will, with the *postscript*, as a revocation of the first. The District Court established the *first* as the will of *Charles F. Bates*, from which judgment an appeal was taken, by the widow, to this Court.

In addition to the testimony arising from the face of the papers, a variety of *parol* evidence was introduced, in the Court of Appeals.

It was admitted that *Charles F. Bates* was married on the 28th of *May*, 1806, and died on the 30th of *May*, 1808.

*Edward Bolling*, a witness, proved, that about three or four weeks before the death of the testator, he was in his company, and the conversation turned on the subject of wills. Mr. *Bates* said it was inexcusable for a man not to keep a will by him, particularly a man in his situation; that he was determined not to be without one many days; that no business should prevent it; and that he had rather die intestate, than not write his will himself. In answer to interrogatories, the witness further stated, that this conversation took place at Mr. *Bates's* own house, and that Mr. *Bates* had had a child born during his marriage with the present appellant, but that he had been informed it was born dead.

*William Gray*, another witness, was at the house of the testator about twelve or fifteen days before his death; he was then in good health, and requested the witness to walk with him to the family burying-ground, observing, at the same time, that he wished to consult him as to the best mode of inclosing it. While at the grave-yard, a conversation ensued, as to the usual ceremony at the burial of the dead; when the testator observed, that he was pleased

with the *masonic*, and wished to be buried in that way. The witness asked him whether, if he should be the longest liver, he should take notice of what he had said, and cause him to be buried with those ceremonies. He replied no ; it was unnecessary, as he intended to leave instructions to that effect in his will.

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Being interrogated, the witness said, that the testator did not say whether he had a will by him or not ; that his child was born in his life-time, but it was always understood to have been born dead ; that the *cancelled* will was found in a little box, in a trunk, carefully laid away with other papers, in which box there were also several curious pieces of coin, of gold, silver and copper ; but there was no other circumstance inducing an opinion that it was *carefully* laid away, except that it was *smoothly* placed in the situation above mentioned ; that the testator was one of the most precise and methodical men in the world ; that, during the early part of his illness, the witness believed him to have been in a situation to have *dictated* a will, though not to have *written* it himself ; but in the latter part of his illness he did not believe him to have been capable, being sometimes deranged, and talking rather wild ; that the testator expressed no wish, in the hearing of the witness, to make a will, during his illness, in the early part of which he did not appear to be very sick, but was so afterwards ; that the witness had been called on, in his neighbourhood, to write one will, and that very eminent counsel resided about ten or twelve miles from the testator ; but that he had heard the testator say, that he preferred writing his own will ; that the trunk, in which the *cancelled* will was found, was such as is usually kept in a house, being larger than a travelling trunk : that the witness had no reason to suppose the testator apprehended immediate death, in the early part of his sickness, as he did not appear to be very ill ; and, that during the whole of his illness, he never said any thing, in the presence of the testator, about his having a will, or his wishing to make one.

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*Winnifred Heath*, another witness, was at *Mr. Bates's*, during his last illness, and heard him express a wish that he had a good will ; at other times, he said he wished some person could make him a good will. In a conversation between the witness, and the mother of the testator, about his illness, *Mrs. Bates* said, she wondered if *Charles* had a will, to which the witness replied, she had heard him say that he wished he had a will. His mother observed, that he used to keep a will by him, before he was married ; that he had made one and given it to her to keep, and that, afterwards, he took it from her, but whether he returned it or not, she could not tell. He then made another will, and gave it to his mother ; and after his marriage, as she told the witness, (to the best of the witness's recollection,) he asked her for it, and took it and cut his name out. At another time, her son *Charles* said, mother, are you sure you gave up that will ? and she answered, yes ! *Mrs. Bates*, then pausing, turned to her daughter *Sally*, and said, *Sally*, are you sure that I gave up that will ? and she answered, yes, mother, you did.

On being cross-examined, the witness said, that the above conversation passed during the last illness of the testator, who was sick for eight days only ; that he was, at that time, extremely ill, and not in his senses ; that he was a very affectionate son, but the witness had never heard him say any thing about making a provision for his mother ; that he was often delirious, but not so when he made the observations about his will, which was about the middle part of his illness ; that the day after the death of the testator, a conversation took place between *Mrs. Bates*, the mother, and *Mrs. Bates*, the widow, when old *Mrs. Bates* asked her son's widow what she intended to do ? whether she intended to administer on the estate ? To which she replied, that she did not know, but would consult her friends. Old *Mrs. Bates* said, that she wished *Charles* had made a will ; and her daughter-in-law said, that the law provided, and she would have her's during her life, and after she was dead she would not want it. Old *Mrs. Bates* said, it would have

been more satisfaction to have had it, to do as she pleased with it ; that old Mrs. *Bates* was with her son the greater part of his illness, and bore his death with great fortitude ; and that his death was not apprehended till about two days before he died ; that Mr. *Bates's* child was born about six or seven weeks before his death, and was born dead.

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*William Miller*, another witness, was present when the first will was found. It was found by Miss *Matilda Bates*, in a part of the house occupied by her mother, old Mrs. *Bates*, and brought into the room open, where she and the witness were. On Miss *Matilda's* handing it to her mother, she asked what it was ? and was told it was a will. She then asked her daughter what she handed it to her for ; and, looking upon it, let it drop from her eyes. The witness did not know by whom the seals of the will were broken, but they were so when the paper was handed by Miss *Matilda* to her mother ; that old Mrs. *Bates* appeared to be much affected when she saw the will, and seemed as if she would faint, and one of her daughters stepped up to her and fanned her ; but the witness could not tell whether this appearance was the effect of surprise, of satisfaction, or of grief. This will was found after administration had been granted on the estate, and after the other will, with the name cut out, had been discovered.

*William Clarkson*, another witness, proved that the child *Clemensa* appeared to be an object of the testator's affection ; that he put it with the witness to board, on the last day of *October*, 1805, and it was then living at the house of the witness ; that the testator furnished it with clothes, and regularly paid its board ; that when he brought the child to the witness's house, he told him that her father's name was *George Alexander Stevens Trueheart* ; that she was then about four years old, and when she was eight he intended to send her to *Bethlehem College*, in *Pennsylvania*, till her education should be as complete as any lady's in

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the country, and that afterwards he would make her fortune at least five hundred pounds.

*Frederick Woodson*, was a near relation of the testator's, and had had repeated conversations with him on the subject of his wills, until a short time before his death. In the spring of the year preceding his death, he was at the house of the witness, and speaking of his wills, he observed, that he had a will, which he wrote many years ago, but that he did not like it, and would make another in a very short time ; that he was at the house of the witness monthly, or oftener, having usually lodged there while attending an adjacent Court, in which he practised the law ; and that the latter conversation was shortly before his death. He told the witness, that he did not approve of the will he had, and, in making another, he meant to make his mother independent, in some degree ; he meant to give her something at her own disposal, but did not tell the witness what it was. This was one among several conversations had with the witness about that time, and arose from his finding fault of the testator's conduct with respect to his mother ; in not taking that care of her which he ought to have done, as the witness had been informed. It was a kind of admonition or reprimand from the witness, which he often repeated.

In answer to interrogatories, the witness said, that he understood from the testator, that his second will was cancelled, and that his first will was then in 'existence, and in the keeping of his mother, but that he did not like it ; that one reason for his disapproving of the will, was, that it did not sufficiently provide for his mother ; the other was, that the property was in some measure incumbered, which the witness understood, from hearing the will read, was the control given over it to the executor ; that when he heard that *Charles F. Bates* had died intestate, he supposed the will had been destroyed ; and never had any conversation with any of the family about it, till after it had been found ; that he was induced to give the reprimand to his relation, from having heard, that, of late years, and since his marriage,

he had not treated his mother well ; that he understood, from the testator, that his second will was destroyed, but not in what particular way ; that he was informed of this, before the conversations last had on that subject ; and that he understood him, that his first will was in force, and in the keeping of his mother.

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*Larner Bradshaw* stated, that, in *May*, 1805, when *Thomas F. Bates*, father of the testator, died, the witness was in company with the testator, who informed him that he had made a will, taking care of his mother. He repeated the same declaration, in the month of *February* or *March*, before he died. What led to the last conversation was some difference which had taken place in the testator's family ; when he told the witness how much he was disturbed ; and that he had made a will, and taken care of his mother ; and that all the people in the world should not prevent it.

*Charles Hopkins* had lived in the family of *Mr. Bates* as late as the *December* preceding his death. In consequence of the will of the witness's father, the conversation turned on the subject of wills. *Mr. Bates* told the witness that he had, for a number of years, always kept a will by him, and he always condemned it in others not to keep a will by them. The witness had had other conversations with him to the same effect ; and understood him as having then a will by him.

*Christopher Anthony*, the last witness introduced, had had a conversation with *Mr. Bates* on the subject of his will, but could state nothing as to the time with certainty. *Mr. Bates* mentioned to the witness that he had always kept a will by him, and told him whom he had appointed his executor, who was *Major Holman*, named in the will produced.

On being interrogated, he said, that nothing else material passed between him and *Mr. Bates*, on the subject, except that he said he should not die intestate. The witness had



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been acquainted with Mr. *Bates* for about seven years, and thinks this conversation took place about the time of his marriage, whether before or after, the witness could not say.

This cause was very elaborately argued, in *November*, 1808, by *George K. Taylor* and *Hay*, for the appellant, and by *Call*, *Wirt* and *Randolph*, for the appellee; and again in *April*, 1809, by the same counsel for the respective parties, with the addition of *Wickham*, for the appellant. To notice the *whole ground* taken by counsel, in argument, in commenting on the evidence, and animadverting on the situation of the testator and his connexions, from which an inference might be drawn whether he meant to leave a will, or to die intestate, would of itself form materials for a volume. It must suffice briefly to mention the leading *points of law*, relied on by both parties, with the authorities cited to support them.

*For the appellant, and in support of an intestacy*, it was contended, 1st. that the *postscript* annexed to the second will was, of itself, a substantive revocation, in writing, of the first will, within the meaning of the act of Assembly, which requires nothing more than a written *declaration*, as one of the modes of revoking a will,<sup>(a)</sup> and that the care with which *C. F. Bates* preserved this paper, it being deposited among his most curious coins, when he could as easily have destroyed the *whole* paper, as cut his name out of a *part*, was conclusive proof that he meant it to operate as a revocation of his first will.

2. Admitting the second will to have been wholly revoked, still, although it might be true, in general, that the cancelling of a second will would set up the first, yet the rule did not apply where the second will contained a clause of revocation, and that parol testimony, of the intention to revoke, was inadmissible. On the part of the appellant the following authorities were relied on : *Powell on Devises*, 549. 551.

(a) *Rev.*  
*Code*, v. 1. c.  
92. s. 3. p.  
160.

*Cowp.* 53. in *Burtonshaw v. Gilbert*. *Toller's Law of Executors*, 18. *Doug.* 39. in *Brady v. Cubitt*. 3 *Call*, 334. *Yerby v. Yerby*. 2 *East*, 530. *Kenebel v. Scraffon* and others. 4 *Ves. jun.* 848. 5 *Term Rep.* 50. *Doe, ex dem. Lancashire v. Lancashire*. *Toller*, 19. 1 *Bos. & Pull.* 577. *Goodtitle, ex dem. Holford et al. v. Otway*. 1 *Saund.* 277. a. note. 3 *Ves. jun.* 650. 5 *Ves. jun.* 664. 3 *Atk.* 798. 3 *Com. Dig.* 9. 7 *Bac. Abr.* 755. *Gwil.* edit. *Powell on Devises*, 449. 535. 666. 2 *Johnson's N. Y. Rep.* 31. *Jackson, ex dem. Coe and others, v. Kniffen. Roberts on Stat. Frauds*, 465. 3 *Atk.* 552.

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For the appellee, and in favour of the first will, it was insisted, 1st. That the second will and *postscript* annexed, was one entire instrument, made at the same time with the will itself; was usually inserted in all wills as a mere matter of form; and that, by cancelling the second will, the first was set up of course. 2. That it made no difference whether the second will had a clause of revocation or not, the opinion of *Powell* to the contrary notwithstanding, which was not supported by the authorities cited by him; and that the preservation of the second will, by the testator, was probably the mere effect of singularity; for if he had really intended to revoke the second will, he, being a lawyer, would have done it by some act less equivocal than by a *postscript*, consisting of nine words only, annexed to a cancelled will; and that parol evidence was clearly admissible, to shew the intention to revoke. The authorities relied on by the appellee's counsel, were the following: 4 *Burr.* 2512. *Goodright, ex dem. Glazier v. Glazier*, as expressly in point. *Doug.* 40. per *Buller, J.* in *Burtonshaw v. Gilbert*. 2 *Bl. Com.* 449. 1 *P. Wms.* 343. *Onions v. Tyrer*. *Loft.* 575. in *Harwood v. Goodright*. 1 *Ves.* 187. *Willet v. Sandford*. 2 *Ves.* 243. *Fuller v. Hooper. Roberts on Stat. Frauds*, 38. 6 *Cruise's Digest, (Riley's edit.)* 80. 85.

Judge TUCKER delivered the following opinion, on the first argument.

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This case has been very ably and elaborately argued by the counsel on both sides. A great deal has been said upon the evidence, and not a few remarks have been thrown out on the conduct of the parties. The testimony in my opinion may well be reconciled: all the witnesses appear to be persons of clear understandings and respectable characters: they all speak of conversations with the testator at different times, and in different places, and all those conversations (except the few words which one of the witnesses heard him say during his last illness, expressing a wish that he had a good will, or that he had somebody to write a good will for him) happened while he was in perfect health, and in the prime of life; although, as it turned out, he was within a few weeks of his grave. There is nothing in the testimony, or in the evidence, as I conceive, to impeach the conduct or character of any of the parties; a circumstance which I mention for the sake of those who may have been hurt by the sarcasms and insinuations which were more than once indulged in the argument of the cause; and which evidently have had the effect of wounding the feelings of respectable persons, without advancing (at least in my opinion) the cause of their clients respectively.

The counsel have also favoured us with a discussion of the whole doctrine, concerning implied revocations, and republications of last wills and testaments, and I am happy to make them my acknowledgments for it. I have turned to the numerous cases and elementary treatises they have cited, and have endeavoured to draw from them all the information which may enable me, as well on future occasions as the present, to form a correct judgment on that important subject. Many of these cases turn upon particular points in the jurisprudence of *England*, which no longer exist in this country. It may therefore be doubted how far that particular class of cases, which are founded upon the strict words of the statute of wills in *England*, may be applicable to similar cases in this country, since our last statute of wills has been in force; by which a provision materially different from the *English* statute has been introduced. Another numerous class of cases, ari-

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sing out of the different expressions used in the penning of the 5th and 6th section of the statute of frauds and perjuries, 29 *Car. II.* concerning the execution of wills of land, and the revocation of them, as noticed by Mr. *Douglas*, at the end of *Right v. Price*, *Doug.* 232. and by Mr. *Powell*, in his *Treatise on Devises*, vol. 2. p. 249. 2d *Lond.* edit. and by Mr. *Roberts on Frauds*, p. 460 to 465. I think are not likely to be considered as leading cases in this country; since the 4th section of our statute requires a revocation of a will of lands to be executed in the *same manner* as a devise thereof. And this Court have already in the case of *Glascok v. Smithers and Hunt*, 1 *Call*, 479. given to the 7th section, which relates to revocation of a will of chattels, such an exposition as will probably stand in no need of any comment, support, or contradiction from foreign authority. The only class of implied revocations, which can in any manner be applied to this case is, that where the revocation has been made by some declaration in writing, neither changing the *estate* of the testator in the lands, or other property, nor executed *animo revocandi*, as in the case of *Beard v. Beard*, 3 *Atk.* 72. in which Lord *Hardwicke* held a will of personal estate to be revoked by a *void deed* made to the testator's *wife*.

So where a testator devised lands to his sister in fee, and afterwards by indenture let the same lands to her for sixty years, to commence after his death. This was held to be a revocation *in toto*, and not *pro tanto* only. *Coke v. Bullock*, 2 *Cro.* 49. cited *Powell on Devises*, vol. 2. 227. So an agreement for a partition of lands, held as parceners, has been established against a conveyance and against a devise, ratifying and confirming that conveyance, although such agreement was executed in the presence of two witnesses only: the Lord Chancellor declaring the devise to be *revoked* by that agreement. 5 *Ves. jun.* 648. *Knollys v. Alcock*. The last case is perhaps referable to that class, in which, it has been held, that the least change or alteration, in the *nature of the estate*, though not in the testator's *interest or property* therein, has been construed to operate as a revocation.

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If Courts have been thus favourable to the doctrine of implied revocations, can any good reason be assigned, why they should set their faces against express revocations, made according to the very terms and directions of the statute? For, it is admitted that if the first will of Mr. *Bates* be revoked, it is by virtue of an *express revocation in writing, wholly written by himself, and signed by himself*, or not at all. What then are the facts, as to this naked point?

*Charles F. Bates* made his will in 1799, to which he added a codicil about two years after. In *September*, 1803, he made another will, differing very considerably from the first. To this will he subscribed his name. AFTERWARDS, as is evident from the paper itself, upon the same paper, and somewhat below his name, he added these words, on one side of the paper, like the postscript to a letter: "*I revoke all other wills heretofore made by me.*" to which he AGAIN subscribed his name, which still remains uncanceled and unobliterated.

This second will, with the declaration in writing thereto added, is found after his death, in a small box, with other papers, and some money and coins, carefully put away and deposited in a large trunk, in his house. He had with great apparent care cut out his name first subscribed to the will, thereby cancelling THAT to all intents and purposes. But for what reason, or from what motives, he left the declaration of an intention to revoke all former wills, standing unobliterated, and his name still remaining thereto, we are not told, nor is there one tittle of evidence, which relates to THAT particular fact. The declaration itself is as perfect at this moment, as it was the moment he had written and subscribed his name to it. No man can deny that at that time he intended this declaration to operate as a revocation of his first will. No man can say that it does not now appear in as palpable and intelligible a manner as it did then. There is no evidence of what passed in the testator's mind when he cut out his name in one place, and left it standing in another, but the paper itself. That, and that only, must speak his intention. If it had happened, that in his last illness he

had directed this paper to be brought to him, had declared himself dissatisfied with its contents, generally, and had desired any friend who was present to tear it to pieces, or throw it into the fire, and that friend, instead of doing so, had said, "it will be sufficient to *cut out your name*," and had done so, in the testator's presence; I admit that such parol evidence as this would have been proper to explain that which might need explanation; as where a testator should throw the ink, instead of the sand, upon his will, through mistake: but in the present case we have no testimony whatsoever that bears upon this particular fact. I therefore reject the whole of it on both sides, as having no relation whatsoever to *that point*, upon which the cause, in my opinion depends. I consider this declaration, then, wholly written, and *SEPARATELY signed* by Mr. Bates, as an express statutory revocation of all former wills made by him, utterly independent of, and unconnected with, his second will; and by the maker left in full force, at the time of cancelling that second will, and remaining in full force at the time of his death.

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But an objection was taken to the want of a date to it. Although the preceding paper is void, as a will, being cancelled, it furnishes a direct evidence as to the date of this instrument, that it was posterior, not only to the first will, but that the execution of it, at least, was posterior to the second will. It bears date *September, 1803*. Suppose this act of revocation had been written on the back of a letter bearing the same date, or having a postmark of the same date; would a Court shut their eyes against such evidence, though there were no date to the instrument itself? I conceive not. A Jury, upon an issue of *devisavit vel non*, would most certainly find the revocation as made *at* or *after* the date of the letter, or the postmark; and I think this Court may do the same, without sending the parties to a Jury.

Upon these grounds I am of opinion that the judgment of the District Court, admitting the first will to record, ought to be totally reversed.

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Judge ROANE was of a different opinion, and gave his reasons at large, for affirming the judgment of the District Court.

Judge FLEMING concurred with Judge TUCKER, and was for reversing the judgment of the District Court.

But a rehearing being asked for by the counsel for the appellant, on the ground of novelty and difficulty in the case, it was granted by the Court. On which motion, Judge TUCKER delivered the following opinion :

Judge TUCKER. I am not surprised at the present motion, and still less am I disposed to take offence at it. It is very natural for parties litigant to believe their own cause just ; still more so where they have had a judgment in their favour ; and most of all, perhaps, where there has been a division in the opinions of the members of the last tribunal to which they can appeal. All these considerations have, no doubt, had their weight in bringing forward a motion for a rehearing of this cause, decided not without great deliberation by all the members of this Court, and by none with more than by myself. I have given that opinion which my best judgment and consideration have enabled me to pronounce, and so thoroughly satisfied am I with that opinion, that nothing which I have heard in opposition to it has hitherto shaken it, in the smallest degree, nor would any apprehension of the censure of the bar, or of the wise and good in this, or any future age, induce me to grant the motion. To that tribunal, and to a still higher, whenever called before it, I trust whatever may be the errors of my understanding, I shall exhibit a heart immaculate (in my public conduct) as an angel of light. No consideration of that kind either hath, or will ever have, any weight with me. The only circumstance which induces me to grant the motion is the present constitution of this Court ; the possible operation of law upon that constitution, whenever the Court, as at present organized, is full ; and the absence of a

highly respected member of it, who may possibly, at the next term, be able to aid us with his counsel. And should it fortunately so happen, that he should be then well enough to assist our deliberations, although no change of opinion should take place among any of the members now present, his opinion will either confirm the judgment which has been already rendered, or affirm that of the District Court. In either event, I shall be perfectly satisfied, neither feeling any bias towards any of the parties, to all of whom I am a perfect stranger, nor that pride of opinion which cannot brook a decision against it.

I shall only add, that I hope the *whole* report<sup>(1)</sup> of this case, so far as it has proceeded, will be published among the proceedings of the present term. For, it is by no means my wish to shrink from censure, if the opinion I have delivered shall be found to merit it.

Judge ROANE verbally declared that as he had differed in opinion with the other Judges, he wished to be excused from giving an opinion on the motion for a rehearing; but would refer the question to the decision of the other members of the Court.

(1) It would have afforded the reporters real pleasure to comply with the request of the respectable Judge, could they have done it consistently with what they conceive to be a paramount duty to the public. To give a faithful detail of the *decisions* of the Court, is what they have professed, and what they have scrupulously endeavoured to perform. In doing this, their work has exceeded the limits originally contemplated. Were they to give a *journal* of cases *agitated* but not *decided*, it would only add to the *mass of matter*, without increasing the *stock of public information*. Besides, when the judges have agreed to reconsider a case, it would seem that their opinions on the *first* decision should be considered as if they never had existed, and cannot, with propriety, without their own request, or in the event of the second opinion agreeing with the first, be published: for, to publish the *whole* proceedings in a cause, where a rehearing has been granted, would seem to bind down the Judges to abide by opinions which they had agreed to *reconsider*. We have deemed it proper *thus* to excuse ourselves for not publishing the *whole* report of the case, as it appeared at the *October* term, 1808. Another and very substantial apology would be, that considering the whole proceedings at *October* term as liable to be reviewed, and varied, by a subsequent decision, we did not take such notes of what fell from the Judges, as would enable us to report those proceedings with accuracy.

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Judge FLEMING expressed his willingness to hear the cause re-argued.

After the re-argument at *April* term, 1809, the Judges again delivered their opinions.

Judge TUCKER. In the argument of the cause at the present term, it has been insisted on the part of the appellants, that if the Court feel any difficulty upon the fact of revocation, they ought to remand the cause to the inferior Court, with direction to impanel a Jury to try an issue of *revocavit vel non*, to be made up between the parties.

To this it has been answered by the counsel for the appellants, that the probate of wills was, in *England*, a matter of ecclesiastical cognisance, and the proceedings therein originally derived from the *civil* law, and not from the common law. That in these Courts the trial has always been *per testes*, and not by a Jury, to which they were perfect strangers. That our statutory provisions and regulations for a century past are conformable to the proceedings in those Courts; vide *L. V.* 1711, c. 2. 1748, c. 3. 1785, c. 61. 1794, c. 92. That the provision contained in the 11th sect. of the last mentioned act presupposes the will, whose validity is contested, to have been *proved* and admitted to record, in the same manner: and that the same is confirmed by sect. 12. which provides, "that on all *trials* by a *Jury* to be had according to the provisions of the preceding section," the certificate of the oath of the witnesses at the time of the FIRST PROBATE, shall be admitted as evidence, &c. These reasons are perfectly convincing to my mind, that a County or other Court, (though it may also have common law jurisdiction,) when sitting as a Court of *Probate*, must proceed according to the ancient and invariable course of the civil law; and cannot avail themselves of their common law jurisdiction, in common-law cases, to pursue or to direct any other course whatsoever. For it is the *cause*, not jurisdiction of the Court, which marks out the course of proceedings; and it would be no less a violation of the principles of jurispru-

dence, for the Court to refer the execution of a will, or of a declaration in writing, purporting to be a revocation of the same, to the decision of a Jury, instead of deciding it themselves, than it would be for the Court, sitting as a Court of common law to undertake to try an issue on a matter of fact, joined between the parties. Nor do I conceive this Court could mistake its own powers more in directing such a course of proceeding as just mentioned, to be had in a common law case, than by directing a Jury to be impanelled, as proposed, in the present case.

With respect to the merits; I have reviewed the evidence, have deliberated on the arguments of counsel, and revised and considered the opinion I formerly gave. And finding no reason to change it, in any respect, I can only repeat, that I am of opinion, as formerly, that the judgment of the District Court be reversed, &c.

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Judge ROANE. On the 16th of *November, 1799, Charles F. Bates* executed, at *Belmont*, the will now in question. This will makes ample provision for his *mother*, and his father's family. The whole body of the will, except the word "*trouble*," is written on the *first side* of a sheet of letter paper, and in a fair and regular hand; whereas the concluding sentence, "In testimony whereof, I, *Charles F. Bates*, have set my hand and seal, at *Belmont*, this 16th of "*Nov. 1799*," is written in a more running and less correct hand. From this circumstance I infer, that the will had been previously and deliberately prepared by him, and was subsequently executed, at the time and place above mentioned. On the 23d of *September, 1801*, he executed a codicil respecting the purchase-money and *title* of *Be'mont*, and, revoking his will, as to two negroes directed to be manumitted, *but not as to any thing else*. This codicil, like the will, is also *dated* (under the same, and above the signature of the testator) "*23d September, 1801*." This codicil is sealed by the testator. It is also headed by him thus; "*Codicil*;" whence I infer that, when the testator intended to make a codicil he would denominate it one. It

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makes material alterations in the will; and so comes properly within the definition of a *codicil*. It bears date near two years after the will, and, like the will, appears to have been written at leisure, and with a steady hand. It follows at a reasonable distance from the will on the same side of a sheet of paper, where there was ample room to insert it: whereas the *postscript* in question is with difficulty foisted in, at the *bottom* of the *quarter* part of a sheet of letter paper; a place scarcely adequate to contain a sentence omitted through mistake, to be inserted in the will, which it immediately follows, and certainly not spacious enough to have been selected by any person, however niggardly in his temper or disposition, (of which, in relation to the testator, there is no evidence whatsoever,) for the insertion of a *codicil*, or a *subsequent* and independent *declaration* revoking the will in question.

This will and codicil shew a firm and steady purpose, in the testator, existing for a great length of time, to provide for his *mother* and his father's family; a purpose which was never renounced by him up to the time of his death, as is abundantly proved by the testimony: they shew also, another circumstance, very important in this case; and that is, that, when a codicil *was* executed at a time *subsequent* to the date of the will, the testator thought it necessary to annex the proper date to that codicil; the omission to do which, in relation to the *postscript* in question, seems conclusive to shew, according to the testator's own ideas on the subject, that that *postscript* was written at the *same* time with the will. This will and codicil, providing amply for the *mother* and family, as aforesaid, was folded up in the form of a letter, sealed with three seals, and indorsed, in the manner of directing a letter, "*Caroline M. Bates.*"

The *cancelled* will in question is folded up and *indorsed* by the testator, "*C. F. Bates's WILL.*" It is *not* indorsed *C. F. Bates's will and codicil*: whence the idea would seem to be repelled, of its being more than *one* instrument. The same inference also seems to result, from heading and

commencing the instrument thus: "This last WILL of  
 "Charles F. Bates, written with his own hand, at Rich-  
 "mond, the 2d day of September, 1802:" and there is no  
 other *date* to it than the above; there is none at the end of  
 either the will or the postscript. I infer, from these cir-  
 cumstances, both the testator's own idea that this writing  
*all* formed but *one* instrument;—his "last will and testa-  
 "ment," and that the date prefixed as above, ran through,  
 and applied to both writings. It is a very reasonable and  
 natural construction that a writing, without a date, imme-  
 diately following one which is dated, will be taken to be  
 written at the *same* time; especially if, from the contents of  
 the last writing, it is evident it was meant to supply some  
 defect or omission in the former: if, as in this case, the in-  
 strument only contains the mere formal and *drag-net* words  
 of revocation used in almost all wills whatsoever; in that  
 case *one* date is amply sufficient; for the writings are in  
 fact, but one instrument. When to these circumstances,  
 and especially the inference arising from the *omission*  
 of a date to this postscript, or writing, (whereas one  
 is annexed to the codicil to the established will as before  
 mentioned,) we add the undoubted facts arising from in-  
 spection that the *ink*, appearance of the writing, and, even of  
 the nib of the pen, seem precisely similar in the cancelled  
 will and in the postscript; and that the smallness of the  
 writing in the *latter* (which *smallness* also, is inconsistent  
 with the idea of its being a distinct and substantive act of  
 revocation) is accounted for by the want of room upon the  
 paper, I am well satisfied that they were both written at the  
 same time: and, indeed, what is the postscript but a writing  
 necessarily to be construed as a part of the will itself, it  
 being nothing more than the formal declaration generally  
 contained in all wills, and only put in after the signature of the  
 main body of the will, because the testator had forgotten or  
 omitted to insert it therein. It was added only through  
 abundant caution by the testator. It is here to be re-  
 marked, that while the testator is *proved* to have spoken of  
 a *first* and *second* will, he never spoke of a second codicil,

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or of any distinct revoking instrument. Thus, it is proved by Mr. Woodson, that the testator gave him to understand that his second will "was entirely destroyed," and that his *first* will "was in force, and in the keeping of his mother." This declaration of the testator is entirely inconsistent with the idea that the postscript did not fall together with the will; or that it was a subsisting and independent act of revocation. This postscript was not a *codicil*, because it neither adds to, nor diminishes from, the will to which it appertains, which forms the definition of a codicil; and because it is not headed "a codicil," nor indorsed "a codicil," nor ever mentioned or considered as a codicil by the testator: nor is it a distinct and substantial act of revocation; because an instrument of that character would have been more lengthy, particular, and explicit; it would not have been crowded in at the very bottom of the page, and in a small hand-writing; it would not have contained *only* the very sentence (and in the very words) which is usually added, and that only through abundant caution, at the end of a will before the signature of the testator. Being, therefore, neither a codicil nor a distinct act of revocation, and yet being something, it is undoubtedly a part of the *will itself*, omitted to be written therein, and afterwards written and *resigned* by the testator at the same time: the words "other" and "heretofore," necessarily attach it to the will which it immediately follows, and fix its writing and signing to have been at the same time with that of the body of the will. This *postscript* was therefore written at the same time with the second will; but, at any rate, it was written *before* the cutting out of the name of the testator from it. I infer this. incontestibly, not only from the foregoing circumstances, but because in using the term "OTHER wills," it recognises this cancelled will as a subsisting will *at the time*, which it was not after the name was cut away; the postscript was therefore added (at any rate) *previous* to this act of cancelling, if it was not (as I have no doubt it was) coeval with the will itself, and written with the same pen.

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As to the cutting away the name to the will, and leaving that to the postscript, I will not say, but that, *in the absence of all testimony*, or in the event of a preponderance of testimony, that circumstance *might* be considered as amounting to a revocation *pro tanto* only ; the consequence of which would be, that the postscript would be left in force. But there is a good deal of testimony in this case, in opposition to that idea, the effect of which must be considered ; such testimony being entirely admissible and proper, as I shall presently attempt to shew.

If this *postscript* had been contained in the body of the will, and there had been only one signature, it is evident that the cancelling the last will would clear the way for the *first*, which would consequently be established. The doctrine in the case of *Glazier v. Doe*, 4 Burr. 2512. is in point on this subject. It is true that that report of the case does not say, expressly, that the *last* will had a clause of revocation in it ; but, in the case of *Goodright v. Harwood*, 3 Wils. 508. one of the counsel said that *it had* ; and this was not denied by the Court or opposing counsel. This also was the case in *Burtenshaw v. Gilbert* ; (a) and it was *only* (a) *Comp. 54.* the circumstance of the *first* will being cancelled, (and not on account of the existence of this clause of revocation,) that the will in that case was deemed to have no effect. As to such a clause of revocation, it also is liable to be revoked ; and, being revoked, before the death of the testator, is as if it had never existed. In the sense and substance of the transaction, is there any difference between such a clause contained in the body of the will, and in a postscript, written at the same time, and considered by the testator as forming a part thereof ; as forming, in fact, with the body of the will, but *one* instrument ? A codicil “ is reputed for part and parcel of a testament ;” *Swinb.* 15. and will generally stand or fall therewith. This is equally the case, at least of different paragraphs of the same will, and this consideration, which could not have been unknown to the testator, (a *lawyer*.) will have its due weight, when we are considering *quo animo* the name was cut away in

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the case in question : at the same time I readily admit that a codicil, or even *one* paragraph of a will, may be retained, while the will, or the residue of the will, as the case may be, may be revoked or cancelled. I consider this postscript, therefore, as not an *independent* declaratory act of revocation, (for no such declaratory act was ever, since the creation of the world, written in so few words on so small a space of paper, in the mere formal words of a common clause of revocation, or, in short, couched in the terms of an unsealed, undated, and *paltry* postscript,) but as predicated on the will *then* made, and a part thereof, and liable to stand or fall by that will's being cancelled or suffered to take effect. There is no evidence (but the contrary) that the testator meant to die intestate : but even considered as an independent declaratory act, written prior to the act of cancellation, it was still liable to revocation by that or any other competent act, and the question is, whether, even considered in that point of view, it was not revoked by the act of cancelling we are now considering.

(a) 1 Bl. Rep.  
1043.

As touching the question of revocation, there is no doubt but that *parol* evidence is admissible. It is admissible as well to shew that a complete defacing of the instrument, was not intended as a revocation, as that an act short of cancelling, defacing, burning, or obliterating, was so intended : the result, in both cases, will be governed by the *intention*, and not merely by the act itself. The case of the ink thrown upon a will by mistake, and which, although it obliterates and defaces, does not cancel it, is an instance of the first kind ; and the case of *Mole v. Thomas*, (a) where the will being neither torn *through* nor *burned*, but *both* having been *intended*, was held to be revoked, is an instance of the latter. So any other *equivocal* act ; equivocal as to a *total* or a *partial* revocation, is subject to be explained by similar testimony. *Revocavit vel non* is similar to the question of *deviseavit vel non*, and is a *question of fact* for the consideration of the jury. (b)

(b) *Powell on  
Devises*, 634.  
3 *Wils.* 508.

As this question respecting the admissibility of *parol* evidence, in cases like the present, is very important, and,

in my view of the testimony in this cause, repels the presumption of revocation beyond a possibility of doubt, I will go into it rather more at large.

In the case of *Brady v. Cubitt*,<sup>(a)</sup> Lord Mansfield laid it down, that the presumption of revocation was liable to be rebutted by "*every kind of evidence*:" and Buller, J. said that implied revocations must depend on the circumstances at the time of the testator's death; which circumstances, I presume, cannot be known without a resort to parol testimony.

In *Wilson v. Rootes*,<sup>(b)</sup> this Court, sitting as a Court of Probate, not only went into the *whole question* of implied revocation, and decided that the will was revoked by a subsequent marriage and birth of a child; (which ground of revocation could only have been proved by parol evidence;) but relied on evidence stated in the record, shewing that the testator, the night before his death, *expressed a desire to make provision for the devisee*; whence was inferred the testator's opinion and belief, that the will was not subsisting, but revoked. In that case, by way of exception from the general doctrine that marriage and the birth of a child operated as a revocation of the will, the appellee had *shewn in evidence*, that he was a recognised natural child of the testator; and the parol evidence last mentioned was intended to do away any result arising from such ground of exception; so that there was parol evidence, on both sides, and such evidence was commented and relied on by the Court. In the opinion of the Court, as delivered by the President, it is relied on in favour of the revocation, that the testator did not, after the birth of the child, "*republish his will, or signify an intention that it should be established, or have any force or effect after that period*," but that his mind was inclined otherwise, as appeared from the testimony. If, in that case, (like the case before us,) after the supposed act of revocation had taken place, the testator had *signified an intention* that the will should still operate or have effect, if he had acknowledged it as a subsisting will, the marriage and birth of a child notwithstanding, undoubtedly a different decision

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(a) Doug. 49.

(b) 1 Wash.



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would have been given by the Court. This case, however, is conclusive, both to shew that the Court of Probate can go into the whole question of implied revocation, and, in doing so, is at liberty to repel or support the presumption of revocation by *parol* evidence.

(a) *Vesey.*

In the case of *Warner v. Matthews*, (a) evidence was received, in opposition to the probate of a will, that a subsequent *unfinished* will was made by the testator; of many declarations of the testator shewing he was not satisfied with the will before the Court; shewing the *insanity* of the principal legatee in that will; and that, since it was made, that legatee had also become very opulent, whence it was argued that the testator could not mean that will to stand: all this testimony was received and relied on without objection.

(b) 2 *Hen. & Mumf.* 467.

In *Cogbill v. Cogbill*, (b) it seemed admitted by the counsel on both sides, that *parol* evidence was admissible in cases like the present, and such evidence was considered and relied on by the Judges.

(c) 1 *Hen. & Mumf.* 478.

In *Temple & Taylor v. Temple*, (c) the declarations of the testator, before his understanding became impaired, as to the manner in which he meant to dispose of his estate, and corresponding with the actual dispositions in the will, were relied on by one of the Judges to support the will, and overrule objections to the competency of the testator to make a testament.

(d) 3 *Call.* 334.

In the case of *Terby v. Terby*, (d) a man having children by a former marriage, devised his whole property to them; he afterwards married, and had children, and died without altering his will: on the question whether the will was revoked or not, it was proved by a witness (*inter alia*) "that the testator, in his last illness, refused to alter his will when proposed to him, saying he wished some alterations to be made in his will, and that, when he got well, he would make them." The Judges, in delivering their opinions, all quoted and relied on *parol* testimony. The first Judge who gave his opinion said, that the will so far from being considered by the testator as revoked, as being no will, was considered as a *subsisting* will, but one which

he intended to alter ; (this is precisely the case of the will in question—see *Woodson's* deposition ;) that this was proved by *Abner Dobyne* ; that a reference to a will as a subsisting one rebuts the presumption of revocation ; and that an intention to *revoke* a will, and, much less, an intention to *alter* one, will not revoke it ; and relied on the circumstance, (*proved* in the cause,) in support of the will, that the testator declared that his first children should not be injured by his second marriage, and that he intended the land he lived on, even after the birth of his last child, for the sons of the *first* marriage : another and *ulterior* ground was taken by this Judge on general principles ; but the other Judges were silent on it ; namely, that the will being in favour of *children* the subsequent marriage, and birth of children, did not import a revocation of it.

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Judge *Fleming* said, that presumptive revocations may be rebutted by expressions in a will, or by circumstances ; and that in the present case there was *abundant evidence* that the testator, when about to marry, *declared* it should not injure his *first* children, and that, even after the birth of a son by the last wife, he was heard to say he did not mean to give him any land, but to give him an education and send him to sea, and that these *circumstances* repelled the idea of revocation, even upon the principles of the *English* law.

Judge *Carrington* said, that presumption may be rebutted by *circumstances*, and that here the testator *spoke* of a desire to *alter* his will, not to *revoke* it ; added to which, the testator had said he did not mean to give his second children any thing, but to educate and send them to sea ; and that *these circumstances* destroyed the idea of revocation.

Judge *Lyons* concurred in the opinion, and the will was established.

I will dismiss this case of *Terby v. Terby* for the present ; merely saying that it is full up to the case before us, in the

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*very point*, and must overthrow the idea of *revocation* entirely, unless the witnesses, and particularly Mr. Wood on, a man of the highest respectability, and whose *manner* of giving testimony (in the view of this Court) did him honour, shall be adjudged by us to be *perjured*.

I trust I have proved, by this detail, beyond the possibility of a doubt, that *parol*-evidence of facts or circumstances; that declarations of the testator after the making of the will, and even before it, and up to the time of his death; nay, even, in the emphatical language of Lord Mansfield, that "*every kind of evidence*" is admissible upon the question of revocation. The only *desideratum* is, whether the testator considered it as a *subsisting* will, or a *revoked* will at the time of his death. It is not material, if the former, that it was not a will entirely to his mind. The case of *Terby v. Terby* proves this expressly; as also the case of *Cogbill v. Cogbill*, in which this Court established a codicil *pro tanto*, although the testator wanted to add something else thereto, which he did not live to effect: we established it as his codicil, as the Court did the will of *Terby*, although neither of them were entirely to the mind of the testator, but he wished to alter them in both instances.

In pursuance of these principles, if, in the case before us it were proved, that the testator declared *at the time* of cutting away his name, that he meant thereby to revoke both the will and the *postscript*; and, in pursuance thereof, had cut out his name in the manner he has done; can any man hesitate to say, that the whole would not have been thereby revoked? In such case, an act which, standing singly, might be considered equivocal, as to the *extent* of the cancellation, would be explained and rendered certain, as to the intention of the testator, and consequently as to the effect of the act, by the testimony of his declaration at the time. In the case actually before us, in the absence of declarations made by him at the time, his intention at that period, in executing that act, may as well be established by his posterior declarations and admissions. These may be resorted to

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either to shew that this cancelling was intended *at the time* to extend to the postscript, as well as the will, or that, at a *subsequent time*, this act was recognised and adopted by him in that enlarged and extended sense ; that he, at such future time, considered the established will as a *subsisting*, and not a revoked one.

The foregoing cases abundantly shew, therefore, that it is not the mere act of cancelling itself, which determines the question : the cancelling or the revoking act only shews the intent of the testator to revoke or cancel ; and where it is equivocal, its effect may be explained, narrowed, enlarged, or done away by the production of other testimony.

Having thus endeavoured to pave the way, therefore, I will briefly consider the testimony before us. Mr. Woodson tells us that, in the *February* or *March* before the testator died, he was two or three times at his house, when the subject of both his wills was mentioned; that the testator informed him " THAT HE HAD A WILL, which he wrote " many years ago, but did not like it and would make another in a very short time, and that this conversation was " a little before the death of the testator ;" that the testator was not satisfied with this will, *as being less favourable* to his mother than he intended. This evidence shews the testator's admission of a *subsisting* will ; one indeed which he intended to alter, but which was still a will until it should be revoked or altered. (See *Yerby v. Yerby*, 3 Call, 334.) This admission repels the idea of the existence in force of the postscript in question ; or, rather, admits that it was cancelled, as well as the body of the will : for, if it were still in force, as an independent act of revocation, the will of 1799 was destroyed, and was not a *subsisting* will ; as the testator is proved to have considered it. This admission explains therefore the extent of the act, supposed to be equivocal, of cutting away his name from the cancelled will. In answer to a question, this witness also said, that he understood from the testator that " the second will was " cancelled and the first will then IN EXISTENCE, and in the " keeping of his mother, but that he did not like it." In

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answer to another question, he said, the "testator spoke of "having made a *subsequent* will and having cancelled it; "and that the *first will was in force, and in the keeping of "his mother.*" Nothing is said, any where, of the idea of any person, that there ever were more than *two* wills, or that there was any distinct declaratory and revoking act or instrument;—that discovery was reserved for the ingenuity of the appellant's counsel; and, when the testator, long after the cancellation in question, considers the first will as *IN FORCE*, (which he could not have so considered if the postscript was a distinct existing act of revocation,) is not this conclusive to shew his idea that the cancellation was intended to extend, and, therefore, *did extend* to the postscript as well as to the will? This witness, Mr. Woodson, had frequent conversations with the testator on the subject; received from him similar answers at various times, nearly up to the period of his death; and the character and manner of giving evidence of this witness are entitled to the greatest attention. Mr. Bradshaw corroborates this testimony by saying that, in *March*, 1808, the testator told him, "HE HAD A WILL, and that nothing should prevent "him *from taking care of his mother.*"—Mr. Hopkins also confirms it, by saying that, in *December*, 1807, he understood from the testator, that *he had a will*; and for a number of years had kept a will by him.

This testimony, therefore, of several corroborating witnesses, and relating to different times and conversations, shews the uniform sense of the testator, long after the act of cancellation in question; that the will now established by the judgment of the District Court was a *subsisting* will; and there is no witness to prove, that any other idea was ever held by him: it consequently determines the extent of the testator's *intention* in relation to the act of cancellation, as coming from his *own mouth*, and when he stood entirely indifferent to declare the truth; and, with me, is equally conclusive with testimony going to establish his declared intentions as at the time of executing the act.

This testimony, therefore, like the declaration proved, in *Terby's* case, to have been made by the testator in his last illness, that he had a will which however he intended to alter, thereby admitting that the will was not *revoked* by the second marriage ; or, on the other hand, like the admission by the testator in the case of *Wilcox v. Rootes*, saying, on the night before his death, that he had a desire to make *some* provision for the devisee, that the will formerly made in *his* favour was revoked, or did not exist ; this testimony, as in those cases, proves beyond a doubt, that the testator, long after the act of cancellation, *admitted*, by these expressions, that the first will was not revoked, but was still subsisting, and consequently that the act of cancelling had extended to the *whole* writing.

Is there on the other hand, any testimony which weighs down this testimony ; or, rather, which may not be reconciled with it ?—or is there any testimony adequate to shew that, *subsequent* to the testator's acknowledgment of the will as a *subsisting* will, as aforesaid, he did any act to destroy or revoke it ? The latter is not pretended :—let us briefly examine the former.

The testimony of Miss *Heath* is, that the testator wished he had “ a *good* will ;” and that he often repeated the idea. This is entirely consistent with the foregoing testimony ; viz. that the testator had a will, but was not satisfied with it : it was such a one as perhaps, he did not esteem a *good* will as he intended to *alter* it ; but yet is a legal will until revoked or altered. Mr. *Gray's* testimony only shews that the testator meant to *alter* his will, by leaving instructions therein touching the manner of his burial. As to the testimony of Mr. *Bolling*, it is, that the testator three or four weeks previous to his death, said “ that it was inexcusable “ for a man not to keep a will by him ; particularly a man “ in his situation ; that he was determined not to be without one many days ; and that no business should prevent it.”

This testimony is susceptible of the *same* answer, viz. that he had no will by him that was entirely to his mind ;

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and that many days should not elapse before he would have one of this character. The appellant have not proved that the testator ever declared that he had *no will* by him ; whereas, on the other hand, it is proved that he often declared, that he had *one*, and that one a will in force, and in possession of his mother ; one, however, I admit, with which he was not perfectly satisfied, as not being sufficiently favourable to his mother, and which he intended to alter. My deduction from all this respectable testimony is, that all the witnesses have sworn to the truth ; but that the testimony *last mentioned* must be taken under the restriction just stated.

We must take it under this restriction ; impute perjury to the very respectable witnesses for the appellees who have sworn, *affirmatively*, to the testator's recognition of the will in question as a *subsisting* will ; or the declaration of Mr. *Bolling*, (the *only* witness for the appellant, whose testimony is not *easily* so to be reconciled,) must stand justified by some *posterior* will, or *declaratory* act of revocation ; posterior, I mean, to the point of time to which the testimony of *Woodson* and the other witnesses relates.

No such will or act is pretended ; but, if any such testamentary paper does in fact exist, and should ever hereafter appear, it will take place of the will now established : at present, such a testamentary paper is entirely *in nubibus*, and therefore, no injury can arise from giving the preference to the testimony going to establish the will in question.

The appellee in this case having entirely succeeded in proving recognitions of the established will by the testator, nearly up to the time of his death, it would have been incumbent on the appellant, in order to rebut the same and justify *Bolling's* testimony, taken in an absolute and unqualified sense, to shew that the postscript in question (or some other revoking act) was written *after* the period of such acknowledgments. This he has not done, and cannot do :—on the the contrary, it is established entirely to *my* satisfaction, that that postscript was written at the

same time with the will, as aforesaid, or, at any rate, prior to the act of cancelling in question.

As to the conversations of old Mrs. *Bates* respecting the wills, as detailed by Miss *Heath*, I put them out of the question.

The declaration of old Mrs. *Bates*, that her son asked her if she had *given up* the will, was merely *hearsay* from old Mrs. *Bates* : it is *not* (as some *seeming* indistinctness in Miss *Heath's* deposition might seem, at first, to indicate) an inquiry which the *witness* heard the testator make of his mother : it is therefore not to be considered as *evidence* in the cause. If, however, these declarations are to be relied on ; while, on the one hand, this inquiry could not go further than to import, at most, some dissatisfaction on the part of the testator, with his will, which consequently he wished to *alter*, the declaration must be taken altogether, and then *another* part of it goes to fix the period of time when the act of cutting out the name took place ; that is, at or about the time of her son's marriage ; and they consequently carry *back* that act far beyond the time of the various acknowledgments of the testator, respecting the existence of his *first* will, as proved by the testimony. As to the uncertainty of this lady, whether the first will had been *returned* to her, or not, it is unimportant ; but, it is proved that the testator, in *March*, 1808, acknowledged it to be in her custody. With respect to the emotions created in the breast of the old lady, by the production of the will in question, they are equally honourable to her character and feelings as a mother, and to the filial duty and affection always manifested towards her by her son. It is entirely within the compass and character of human nature, that the hearts of those who, being duly prepared, can bear the shocks of adversity with fortitude, should be moved and melted with the sudden presentation of scenes involving the most dear and tender recollections. The circumstance now so much commented on by the appellant's counsel, can only be viewed in an aspect to do honour to the character of the respectable parties implicated : as to its having been caused by any

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improper or dishonourable conduct on the part of this lady, there is not the least pretence for such an idea.

Great stress has been laid on the circumstance of this cancelled will being found in a box contained in a trunk with other papers; whence it is inferred that the postscript is a preserved and not a *cancelled* paper. That circumstance, *standing singly*, would prove nothing, as many men are in the habit of preserving *every paper* they ever had in their lives; and, as the appellant's counsel have succeeded in proving the testator to have been one of the most precise and particular men in the world, this habit may be well imputed to *him*. But the circumstance does not stand *single*; or, if it does, it is at most but *equivocal* and also liable to be explained by testimony. This equivocal circumstance, (to say the most,) going to shew that the postscript continued in force, is outweighed by the testator's repeated admissions, as aforesaid, that it was not in force; or, what amounts to the same thing, that the first will was in the force and in the keeping of his mother. The circumstance, as it often happens in relation to circumstances, is outweighed by *positive proof*.

But, on the other hand, keeping all the testimony out of the question, and arguing from this circumstance only, how does it happen that the testator (the most precise and particular man in the world) should leave the validity of a revoking act to rest upon the doubts, (to say the least,) resulting from its being contained in a paper cut through and cancelled, and to stake the effect of such an important instrument upon *eight formal words*, to be found in almost every will whatsoever; and that this state of things should have been continued by him for two years after the cancellation? Was paper scarce with him, a lawyer in very extensive practice? was he indolent? or did he not possess leisure or talents to write a less exceptionable instrument? Neither of these will be pretended.

As to the will in question, it is in proof that the testator meant to provide *further* for his mother. It is her misfortune that he did not live to do it: but the will, being admitted to be in force, although he intended to *alter* it, must

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operate as far as it goes. As to *Clemensa*, it is, *perhaps*, her misfortune that the testator died intestate: I say, *perhaps*, for circumstances might have happened to change his opinion on that subject. Her's is, at most, the common case of a party's failing to provide by will for those who have strong claims upon him. All that we have to decide, is, whether the testator *has* made a will or not; not whether it is such as he ought to have made, or whether it extends the whole length of his intentions on the subject.

I have thus stated to you, sir, some of the grounds of my present opinion. I have taken up this case as it were a *new* case; as if it had never, until now, been before this Court. I have forgotten, or, at least, endeavoured to forget, that I ever before gave an opinion upon it. That magnanimity which has often induced this Court to *rehear* its decisions; and give up its former errors, would be but illy maintained by proceeding upon any other idea: it would be violated and degraded, were any Judge not to consider himself as free as the winds of heaven to make up his opinion *de novo*.

I have heard every thing which has been said on this second argument, with patient and calm attention. I have relinquished, perhaps, some of the ideas I expressed on the former occasion, and others have shed new lights upon my mind. If my opinion is not changed as to the great result of this cause, it is because I can never be brought to agree that two and two do not make four.

I have formed my opinion in this case from an anxious attention to *every atom* of testimony in the cause, and from an *inspection* and consideration of the *identical* writings in question, under all their *appearances* and circumstances. These, down to the fortieth part of a hair, are important in my estimation: but, *perhaps*, they cannot *all* be presented, in the reports, precisely as they have appeared to us. Upon the facts and documents proved and exhibited in the cause, I cannot have a *scintilla* of doubt, but that the testator died leaving as his last will the paper which has been established as such by the judgment of the District Court.

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The other Judges are, however, upon the testimony, of a different opinion ! Those Judges being also of opinion, that this is not even a case of so much doubt, upon the testimony, as to make the intervention of a Jury desirable !—I have not made up my mind upon a question of law of the greatest importance, which a contrary view of facts, on their part, would have presented for decision : namely, whether this Court has power, in a case like the present, to direct an issue of *revocavit vel non*.

I beg to be understood as giving no opinion on this important question ; but I shall not conceal that my impressions are always in favour of the maxim “ *ad questiones facti respondent juratores* ;” in favour of the ordinary and constitutional mode for the ascertainment of facts ; nor can I readily discern the utility of devoting the precious time of this high tribunal, entrusted with the consideration and ascertainment of *principles* of law and equity, to subjects to which the genius of our constitution and laws admit, that Juries are better adapted ; of *exhausting* the precious time of this Court in watching the countenances of the witnesses who depose before it, and in determining, for example, whether this or that particular witness is the most deserving of credit.

I conclude, sir, by giving it as my opinion that the judgment of the District Court, establishing the will of the 16th of November, 1799, is correct and ought to be AFFIRMED.

Judge FLEMING. This being a case of much expectation and solicitude, as to the parties interested ; and differing from a worthy Judge, for whose opinions I have the highest respect, I must take more time than usual in stating the grounds of my opinion, and shall necessarily occupy a considerable portion of the ground taken on a former occasion.

With respect to directing an issue, on the suggestion of the appellee’s counsel, at the late argument of the cause ; that proposition has been, to my mind, sufficiently answered by the worthy Judge who first delivered his opinion ; and

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with whom, on this point, I fully concur, so far as it respects expediency in the present case, as I want no verdict of a Jury to ascertain a fact, that to me appears as plain as the meridian sun. But as to the *power* of the Court to direct an issue, I give no opinion at present ; not having considered it with sufficient attention.

With respect to the merits of the case : the important question before the Court is, whether the writing admitted to record by the District Court of *Richmond*, as the last will and testament of *Charles Fleming Bates*, was, at the time of his death, truly his last will, or whether it was not absolutely revoked by the testator in his life-time. In deciding which, I shall first consider the case, as it appears from the written evidence, alone ; and then on the written and oral testimony taken together ; and it will not be amiss to take a short retrospective view of the situation and circumstances of the testator, and of his connections, at different periods, from the date of the writing in controversy, to the time of his death.

At the former period he lived in the house of an indulgent father, who had paid particular attention to his education and morals, and who was, unfortunately, in declining circumstances.

The testator was then a bachelor, and had lately commenced the practice of the law ; and being a man of respectable talents, of great diligence and economy, had a well grounded prospect of improving his fortune. Being thus circumstanced, he, on the 16th day of *November*, 1799, made the will now in controversy ; the whole of which is in his own hand-writing ; at which time both his parents, and several brothers and sisters were living ; and prompted, I conceive, as well by paternal affection, as by gratitude for the care and indulgence of his parents, they appear to have been the first and principal objects of his solicitude and bounty. And in the latter part of his will he directs his slave *Isaac* to be free at twenty-one, and *Charlotte* at eighteen years of age ; and lastly, gave his trustee ten per cent. on the profits of his estate, for his trouble.

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This will (as appears from evidence) was sealed up, directed to his mother, and delivered to her for safe keeping ; and nearly two years thereafter, the testator having for a large sum of money purchased the mansion and plantation where his father dwelt, (called *Belmont*,) he received the will from his mother, broke the seal, and added a codicil, in the following words, to wit, "I wish the balance of the "purchase-money of *Belmont* to be raised by my said executor, as soon as possible, from the debts due me, and a "title made to my said executor, as trustee, in like manner as the personal estate ; and as to *Isaac* and *Charlotte*, "I revoke the preceding part of my will, but not to any thing else.

(SEAL.)

Signed "*Ch. F. Bates*."

"*Sept. 23d, 1801.*"

After adding this codicil, he resealed the will, and returned it to his mother ; and having made pecuniary engagements, perhaps beyond what he formerly contemplated, he found it expedient to retract the benevolence he once intended towards his slaves, *Isaac* and *Charlotte* ; and to make ample provisions for discharging those engagements, and fulfilling the former purpose of his will.

About two years thereafter, his circumstances having been considerably changed, and having formed an imprudent (though not uncommon) temporary connection ; on the 2d day of *September*, 1803, he thought proper to make a new will, (which, without a special clause for the purpose, would, at his death, have virtually revoked the former,) in the first clause of which he declared his most ardent wish to render his mother happy and easy during life ; also his father, and all his children, as long as they, or any of them, continue in his family, remain single, or, in the discretion of his executor, should need assistance. And after a further disposition of his estate, on the death of his father and mother, he recognised the *fruit* of his unhappy amour, called her his daughter *Clemensa*, declared her to be *free*, gave particular directions respecting her education, and made a handsome permanent provision for her, manifesting thereby

a laudable instance of natural affection, and making the best atonement in his power, for his former indiscretion. And lastly, he appointed the same executor and trustee, as in his former will.

On the 26th day *May*, 1805, died *Thos. F. Bates*, father of the testator, who, on the 28th day of *May*, 1806, married Miss *Miller*, the appellant in this cause, which wrought so important a change in his family and affairs, that neither of the wills seemed at all adapted to his then situation and circumstances; he therefore carefully cancelled the latter, by cutting out the signature of his name at the bottom of it, and let remain a little to the left of the signature cut out, the following words, to wit, "I revoke all other wills heretofore made by me," signed "*C. F. Bates*," all in his own hand-writing; which will, so cancelled, with the clause of revocation remaining, he carefully preserved, and kept by him till the day of his death. The important question hence arises, whether this writing was a revocation of the will now in controversy; and if so, 2dly, whether the will thus revoked, has since been so republished and acknowledged, by the testator, as to give it validity.

In considering this question I have not had reference to the *English* authorities, as few of them apply to the case before us, but am governed by our act of Assembly, concerning wills, passed *December* 13th, 1792.

By the third section of that act, the will before us was revocable, either by the testator's destroying, cancelling, or obliterating the same, or causing it to be done in his presence, or by a subsequent will, codicil, or *declaration in writing*, made as aforesaid; that is, either written wholly by himself, or attested by two or more credible witnesses, subscribing their names in his presence: the clause of revocation, or *declaration in writing* above mentioned, having been written wholly by the testator himself, and signed with his name, is precisely and fully within the provision of the act of Assembly; and, to my mind, amounts to an absolute revocation of all former wills by him made. But it was contended by the appellee's counsel, that the *clause* of revoc-

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cation, as they style it, was a substantive part of the will of *September*, 1803, and when that will was cancelled by the testator, the clause, consisting of only "*nine little words*," was cancelled also ; but I am constrained to view the subject in a very different light ; and those nine little words are very explicit, and with the attendant circumstances, appear to me to shew the *quo animo*, and to evince the testator's mind, as clearly as if he had written a volume on the subject. Can it be, for a moment, believed, that when he was cancelling the will of *September*, 1803, as being illy adapted to the then situation of his family and affairs, that he could have entertained the most distant idea that the will of 1799, which was much more so, (inasmuch as he had then married a young wife,) should be thereby revived ? I have a thorough conviction that it would not ; for, had that been his intention, with how much more ease, and less trouble, could he have torn the will in pieces, or thrown it into the fire ; but instead of doing either, he cancelled the will, by carefully cutting the signature of his name from the body of it, leaving the *declaration* of revoking all other wills by him before made, with his name thereto, standing within half an inch of the name so carefully cut from the body of the will. We find this cancelled will, then, and the revoking *declaration*, with the signature of his name annexed, deposited with the most precious treasures of his cabinet. And why was it thus carefully preserved ? As a standing testimonial that he then had no will in existence ; and as an irrefragable proof, to my mind, that that was the real intention of the testator, is the circumstance of the will of 1799, being then in the custody of his mother, in the County of *Goochland* ; which, on cancelling the will of 1803, would have been revived and in force, without some such written declaration of the testator.

But it is contended by the appellee's counsel, as before noticed, that the will of 1803, with the revoking declaration annexed, is one and the same instrument ; and that cutting out the name of the testator from the body of the will, destroyed the whole, notwithstanding his signature remained

to the *declaration*, "that being a mere marginal note." It is sometimes customary, where wills consist of several sheets of paper, for the testator to sign his name to each separate sheet ; but I believe, that in the whole catalogue and history of wills, there cannot be produced a single instance, where a man, acquainted with law, and versed in the technical terms of the science, ever put a double signature to such a will as that of 1803, now before us, and consisting of less than half a sheet of paper, for the mere purpose of authenticating and giving validity to the same. And it appears to me, from a view of the paper itself, and the attendant circumstances, that the declaration of revoking all other wills, was written and signed by the testator, at the time he cancelled the will, and by him carefully preserved, for the sole purpose of revoking the will now in controversy, which was then in the custody of his mother, in the county of *Goochland* ; and it is highly probable, that, as the will of 1803 was made in the city of *Richmond*, where the testator then spent the greater part of his time, in the exercise of his profession, it was there cancelled also : but that seems a circumstance not very material. As it appears to me, that whether the declaration of revoking was written at the time of cancelling the will, or at the day of executing it, and carefully preserved by the testator, it amounts to the same thing, and is to have the same effect.

We are now to consider the second point, whether the will, thus revoked, has since been so republished, and acknowledged by the testator, as to give it validity.

In doing which, we must recur to a variety of oral testimony, which is admitted to be sometimes proper, for the purpose of explaining the intention of a testator, and not by me, denied to be so, in the case now before the Court.

All the witnesses examined on the occasion appear to be persons of respectability, and of fair characters ; and therefore, I give credence to the whole of their testimony *as to facts* ; and shall only consider what effect it ought (taken collectively) to have on the cause. I begin with the testimony in favour of the will now in controversy ; and first

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with that of *Frederick Woodson*, of whose integrity and candour I have not the smallest doubt.

Major *Woodson* states, that in *February*, or *March*, preceding the death of Mr. *Bates*, which happened on the 30th of *May*, 1808, the subject of both his wills was mentioned, when *Bates* informed him, he had a will, which he wrote many years ago; but that he did not like it, and would make another in a short time. He told the deponent *he did not approve of the will he had*, but, in making another, he meant to make his mother independent *in some degree*: he meant to give her something at her own disposal. The conversation arose from the deponent (who was his uncle) finding fault with his conduct respecting his mother, in not taking that care of her which he ought, as he had been informed, and was a kind of *admonition*, or *reprimand* from the witness. The testator spoke of his second will, as having been cancelled, and said that the first will was then in existence, and in the keeping of his mother, *but that he did not like it*.

The witness, on being interrogated by one of the Judges, said, he understood the testator's dislike to the will (meaning the will now in question) was two-fold; first, that it did not provide sufficient for his mother; and secondly, that he understood the property was somewhat incumbered, which the witness from hearing the will read, understood was the control given over it to Mr. *Holman*, the executor. This to me appears a strange inference indeed; for the principal clause in the will is, "that his executor and trustee, *George Holman*, hold all the property of which the testator might die possessed, and not otherwise disposed of, in trust, for the benefit of *Caroline M. Bates*, (his mother,) and under her free and particular control, so long as she continues the wife, or widow, of the said *Thomas F. Bates*; and if she should marry again, and be in need of any thing, then to such proportion as the said trustee in his judgment shall think right, not exceeding one-third of the estate of the testator." And this was thought by the witness, (and as he supposes, by the testator,) an inadequate

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provision for his mother, at a time when the testator had formed the most tender and important connection known in society ; and then had a young wife, in the seventh or eighth month of her pregnancy, with the prospect of a numerous progeny before him ; besides the moral, as well as natural obligations he was under, to make ample provision for his illegitimate daughter, already recognised and emancipated, and for whose welfare and happiness he had shewn very great anxiety and solicitude. To me it is inconceivable that any rational man, with the common feelings of humanity, thus circumstanced, could suffer such a will to exist for a single moment : but we have already seen that it had been deliberately and solemnly revoked. Let us proceed with the evidence.

*Larner Bradshaw*, says “ that on the 26th day of *May*, “ 1806, *C. F. Bates* informed him he had made a will, “ taking care of his mother ; and the latter end of *February*, or *March*, meeting him in the field, he again told the “ witness he should take care of his mother ; that it should “ not be all the people in the world should prevent his “ taking care of her : said he had a will, and should take “ care of his mother at all events.”

Such a resolution was laudable, and worthy of a dutiful son, to an amiable and indulgent mother : but there were others who had still stronger claims on his justice, care, and attention, to wit, a wife, with the prospect of a growing family of children : for we are told in holy writ, (and it is one of the first laws of *Moses*,) that “ a man shall leave his father “ and mother, and cleave to his wife ; and they shall be one “ flesh.” And more especially was he bound by the ties, both of natural affection and of moral rectitude, to make ample provision for the unfortunate offspring of his juvenile indiscretion, and for whose welfare and happiness he had (as before noticed) shewn the greatest and most laudable solicitude ; neither of whom (as wife or child) were in existence at the time of making the will in question, nor for several years thereafter ; and consequently could not have been contemplated by the testator. The consequences under the then

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existing circumstances, could not be so distressing to the former branch of his family, because the issue of the marriage happened to be still-born; and the law makes ample provision for the widow: but far different is the case respecting his natural daughter, who, together with her future offspring, the law has doomed to perpetual slavery, to her nearest blood relations, unless emancipated by their clemency; and so great was Mr. *Bates's* affection for her, that he put her to board (at a liberal price, which he punctually paid) in the house of Mr. *William Clarkson*, a respectable farmer in the county of *Goochland*, whom he told that (as soon as she should arrive at a proper age) he would send her to the town of *Bethlehem*, in *Pennsylvania*, where there is, perhaps, the best seminary for female education, in the *United States*.

These circumstances are noticed to refute the suggestion of one of the appellee's counsel, "that Mr. *Bates* wished to "conceal the existence of his unfortunate daughter;" and to shew the improbability—nay, the moral impossibility, that a man endued with common reason, and possessing the common feelings of humanity, could ever have contemplated the re-establishment of the will now before the Court, which he had so solemnly revoked upon the birth of his unfortunate child. And if it was expedient and proper to revoke it on the first remarkable change in his family, in the year 1803, how much more so was it, that it should remain revoked, after his intermarriage with the appellant, in the year 1806.

To proceed with the evidence.

*Charles Hopkins* says, that he lived with Mr. *Bates*, and continued with him as late as *December*, 1807; and heard Mr. *Bates* say, that, for a number of years past he had always kept a will by him; and condemned it in others not to keep wills by them.

*Christopher Anthony* says, that in conversation with Mr. *Bates*, (but can say nothing as to the time, with certainty,) the latter mentioned that he always kept a will by him;

and told him he had appointed Major *Holman* his executor. He thinks the conversation happened about the time of his marriage ; but whether before or after he cannot say.

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This seems to be the substance of all the evidence adduced in support of the will ; and the *one* spoken of in *Anthony's* deposition was, most probably, that of *September*, 1803 ; but be that as it may, this evidence, without any adverse testimony to weaken the force of it, does not, in my conception, amount to the re-establishment of the will in question, which had been so solemnly, and deliberately, revoked by the testator. And when we come to consider the evidence of *Edward Bolling*, *William Clarkson*, *William Gray*, *Winfred Heath* and *William Miller*, all speaking of circumstances at later periods than those mentioned by the other witnesses, which it seems unnecessary to recapitulate ; the latter, in my apprehension, greatly preponderates, and shews it to have been the opinion of the whole family, even of *Mrs. Bates* the elder, herself, (who had for a long time had this will in her keeping, but had told her son, on his particular inquiry, that she had given it up to him,) that *Mr. Bates* had died intestate. And such was her surprise, when this will was accidentally found by her daughter about two months after his death, that she was extremely affected, and with great difficulty kept from fainting. And had *Mr. Bates*, in his last illness, when he was shewing great anxiety and wishing for some person to write him a will, or (according to *Miss Heath*) a good will, it is to be presumed that had he supposed the one before us in existence, and wished it to be revived, and established as his will, he would so have expressed himself. And it is much to be lamented, that he was, by the hand of providence, prevented from making a suitable provision for the two worthy objects of his filial and paternal regard and affection ; and for whose welfare and happiness he had uniformly shewn the most laudable solicitude ; and were I to decide this case agreeably with my own private wishes, it would be to affirm the judgment of the District Court ; but after the most mature reconsideration of the subject, I am thoroughly convinced that my forme

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opinion was correct, that the paper before the court is not the will of *Charles F. Bates*: and therefore the judgment of the District Court is erroneous, and ought to be reversed—

Which was the opinion of a majority of the Court.

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The Attorney-General (in behalf of the Commonwealth) against Turpin.

The remedy given by the 6th section of the act passed the 15th of December, 1792, "to reduce into one the several acts concerning the Auditor and Treasurer," is not confined to matters of account, but extends to every right in law or equity which any person is entitled to demand of the Commonwealth.

A bill exhibited in the High Court of Chancery, against the Attorney-


General as representing the Commonwealth, but not requiring him to answer *on oath*, was, in this case, received as equivalent to a petition to that Court.

DOCTOR *Philip Turpin* exhibited his *original bill*, in the High Court of Chancery, against the Attorney-General, stating that the Directors of the Public Buildings, appointed by an act of the General Assembly, passed in the year 1779, "for the removal of the seat of government from *Williamsburg* to *Richmond*," did, by virtue of the powers vested in them, sometime in the year 1783, lay off about thirty acres of the complainant's land on *Shockoe Hill*, for the use of the public, and cause it to be valued by a Jury; one parcel of which was estimated at 1,000% and the other at 4,000% but, in consequence of the deranged state of the finances, he did not apply for payment at the public treasury; that in consideration of the design to erect the public buildings on the complainant's land, he made a donation to the Commonwealth of two acres, near the brick house then used as a Council Chamber; that the directors having abandoned their intention to erect the public build-

The lawful emanation, execution and return of a writ of *ad quod damnum* to value land intended to be applied to public uses, immediately divests the title of the individual owner to the land so valued, and transfers it to the Commonwealth in full and absolute dominion; such owner remaining entitled only to the valuation money and damages assessed by the Jury.

Interest is not to be allowed on such valuation money or damages, unless the claimant applied to the Auditor for his warrant, and was refused it; or, having obtained it, was refused payment at the Treasury; but, where, by the consent of the original owner, part of the land taken for public use was directed, by a law, to be revalued and restored to him, and the residue to be retained by the Commonwealth; but, through the default of the agents of the Commonwealth, such revaluation has not been made; the Court of Chancery should direct it now to be made, and decree the value so ascertained, (of the residue,) with interest, from the time when such revaluation ought to have taken place, to be paid by the Commonwealth to such original owner.

ings on his land, he presented a petition to the Legislature, praying that they would determine what part of his ground was intended for public use, and that he might be compensated for the part retained ; not expecting, however, that more than a small part would be restored to him ; nor even *that*, without compensation for the loss sustained, by its depreciation in value while held by the public : that, in consequence of this application, an act passed in 1787, authorising the Directors of the Public Buildings, to convey to the complainant certain lands ; and, accordingly, they, on the 9th of *April*, 1788, came to a resolution, declaring that the interest of the Commonwealth, in the *whole* of the land which had been appropriated to the use of the public, should be released to the complainant, except two acres, to be laid off so as to include the garden annexed to the Governor's house : that these two acres were much more valuable than those originally given ; for the use of which the complainant had been receiving rent from the public. As the object of the donation had failed, the bill prayed that the two acres originally given might be restored, without the Commonwealth's claiming compensation for them in the two acres appropriated to the Governor's garden ; and that satisfaction might be made for the diminution in the value of the other lands. The bill calls upon the Attorney-General to answer the premises ; but, not as in ordinary cases, *upon oath*.

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To this bill the Attorney-General filed a *plea, demurrer, and answer*.

The *plea* stated, that the complainant being conscious that he could not by due process of law recover the two acres of ground, claimed by his bill, had elected the General Assembly to decide upon his title ; and their decisions, being against him, ought to bar his claim.

The *demurrer* insisted that his remedy was strictly and purely a *legal* one, and therefore he ought not to be aided in a Court of *Equity*.

The *answer* denied any knowledge of the terms on which the donation of the two acres was made, by the complainant, to the directors ; and did not admit such donation to

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have been on condition, that the public buildings should be erected thereon.

It appears, from the evidence, there was a competition between the principal proprietors of lots on *Richmond Hill*, and those on *Shockoe Hill*, for the site of the public buildings. Colonel *Richard Adams* offered to make a donation of two acres on the former; and Doctor *Turpin*, of an equal quantity on the latter. The proposal of Doctor *Turpin* was accepted; as one of the directors (Colonel *Goode*) says, under a full persuasion that the public buildings, or some part thereof, would be erected thereon. Other directors state their belief, that the two acres were given by Doctor *Turpin*, in consequence of a similar offer having been made by Colonel *Richard Adams*; and they all agree that the donation was made *after the writ of AD QUOD DAMNUM was executed*; and that although the public buildings were not placed on the two acres given by Doctor *Turpin*, yet they were erected contiguous to other lots of his, which greatly enhanced the value of his property. The exchange of the two acres originally given, for those occupied as the Governor's garden, was considered an accommodation to Doctor *Turpin*, as it enabled him to effect a n advantageous sale of them, (with lands adjoining,) to Colonel *John Mayo*; but it appears, that Doctor *Turpin* was always opposed to such exchange.

The Chancellor (the late Mr. *Wythe*) overruled the plea and demurrer; and being of opinion "that the complainant was entitled in equity to restitution, by the Commonwealth, of the ground demanded by his bill, decreed that the tenant in possession thereof, holding the right of the Commonwealth only, in any action to be commenced for recovering such possession, and the *mesne* profits, shall not plead, or, on trial of an issue, give in evidence, the legal title of the Commonwealth claimed by virtue of the acts of the General Assembly, and the donation mentioned in the bill and exhibits; and that the plaintiff and his rightful successors be quieted in their possession, after it shall have been vindicated and obtained."

From this decree, the Attorney-General appealed to this Court.

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The *Attorney-General*, for the Commonwealth.

*Call and Randolph*, for the appellee.

*For the Commonwealth*, it was contended, that such a suit as this could not be brought. It was an original bill filed against the Attorney-General, as representing the State. The Commonwealth cannot be sued, in any case, except where the law has authorised it ; and then the suit must be brought in the form prescribed by law. No State can be sued otherwise. This results from the very nature of government. In cases not provided for by positive laws, all claims against a State must be subjects of treaty or negotiation. Suppose an individual has a claim against the *United States*, can he sue Congress, or the *United States* generally? Certainly not.

The law(1) authorising appeals from the decision of the Auditor, is necessarily confined to matters of *account*, which regularly come before him. But this is a suit for the recovery of *land*, which never could come before the Auditor in any shape : he would be incompetent to decide upon the right of property, or to award a writ for the possession.

*For the appellee*, it was argued, that this case emphatically belonged to a Court of Equity. The writ of *ad quod damnum*, and the inquest of the jury thereon, had the effect of divesting the legal title of *Turpin*, and of transferring it

(1) *Rev. Code*, v. 1. c. 85. p. 140. sect. 6. " Where the Auditor acting according to his discretion and judgment, shall disallow, or abate any article of demand against the Commonwealth, and any person shall think himself aggrieved thereby, he shall be at liberty to petition the High Court of Chancery, or the District Court, holden at the city of *Richmond*, according to the nature of his case, for redress ; and such Court shall proceed to do right thereon ; and a like petition shall be allowed in all other cases, to any other person who is entitled to demand against the Commonwealth, any right in law or equity."



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to the Commonwealth. If, therefore, *Turpin* had brought an ejectment, the *ad quod damnum* would have been set up as a bar. Every injunction to a judgment of the Commonwealth, is an original suit ; yet there is no act of Assembly which authorises it. Nevertheless, such bills are constantly entertained, because there is no other possible mode of protecting the citizen.

This is an injunction, from its very nature ; being intended to prevent the Commonwealth from setting up the writ of *ad quod damnum*. It is then the ordinary case of a bill of injunction ; and, if it can be filed at all, it must be in such a case as this.

Again, the latter part of the section, in the Auditor's law, before cited, expressly authorises a petition in behalf of any person, who is entitled to demand *any right* against the Commonwealth, either in law or equity. The remedy, then, is not confined to mere matters of account ; but embraces every possible demand, founded on contract, which a citizen may have against the State ; and may be assimilated to the ordinary mode of redress, in *England*, by petition of right.(1)

*Tuesday, May 2d.* The Judges pronounced their opinions, and decree.

(a) Edit.  
1785, p. 100.

Judge TUCKER. By the act of *May*, 1779, c. 21. "for the removal of the seat of government to *Richmond*,"(a) it was enacted, that six whole squares of ground, surrounded each by four streets, and containing all the ground therein, situate in the town of *Richmond*, and in an open and airy part thereof, should be appropriated to the use and purpose of public buildings. And that reasonable satisfaction might be paid for all such lots of ground as might be taken and appropriated for that purpose, the Clerk of *Henrico* County

(1) The arguments of counsel, on the merits of this case, occupied much time, and were accurately noted by the reporters. But, as the case is very fully considered in the opinions of the Judges, we have restricted our publication of the argument to the construction of the act of Assembly alone.

was authorised and required, on application of the Directors of the Public Buildings, appointed by virtue of that act, to issue a writ, in the nature of a writ of *ad quod damnum*, directed to the Sheriff of *Henrico*, commanding him to summon a Jury of freeholders, to meet upon the said lots, and, to the best of their skill and judgment, to value the same in so many *several and distinct parcels*, as should be owned and held by *several and distinct owners and tenants*, and according to their respective interests and estates therein; and that, after such valuation made, the Sheriff should forthwith return the same under the hands and seals of the said Jurors, to the Clerk's office of the said County, and that the rights and property of the said owners and tenants in the said lots of land, should be *immediately devested and retransferred* to the Commonwealth, in FULL AND ABSOLUTE DOMINION. *any want of consent, or disability to consent, in the said owners and tenants, notwithstanding.*

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On the 8th day *January*, 1783, a Jury made the following return to the writ, (*of which there is no copy in the record,*) under their hands and seals.

"Agreeable to a writ of *ad quod damnum*, of the Court  
"of *Henrico*, we of the Jury are of opinion, that the first lot,  
"containing nearly thirteen acres of land, whereon the *im-*  
"*provements* stand, is worth the sum of 4,000*l.* the second  
"lot, containing about fifteen acres of land, we are of opi-  
"nion is worth 1,000*l.* Given," &c.

In *December*, 1787,<sup>(a)</sup> the General Assembly passed an act authorising the Directors of the Public Buildings in the City of *Richmond*, to convey to *P. Turpin* certain lands; which act recites that it had been represented to the General Assembly, that the Directors of the Public Buildings had appropriated, for the use of the public, certain lands within the City of *Richmond*, the property of *Philip Turpin*, part whereof are since found by the said Directors to be *unnecessary* for the said purpose. And that the said *P. Turpin* had made application to the present General Assembly to authorise and require the said Directors, in behalf of the Commonwealth, to *convey and release to him so much of the*

(a) *Sessions Acts, c. 78.*

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said lands, AS THEY MAY JUDGE UNNECESSARY *for public use*. It was therefore enacted, that the said Directors, or a majority of them, should, and they were thereby *authorized and required* to execute a deed for conveying and releasing to the said *P. Turpin*, and his heirs, all the right, title and interest of this Commonwealth, in and to so much of the lands so appropriated, as the said *Directors should judge unnecessary for public use*.

And it was further enacted, that the Directors should cause the lands *deemed unnecessary for public use*, previous to the execution of a deed for the same, *to be valued by a Jury*, in like manner as is directed by law for lands taken and appropriated for the use of the public, within the said City, and should return such valuation to the Court of the County of *Henrico*, there to be recorded. "PROVIDED, *that the Jury in estimating the value of the said land shall have regard to its comparative value, WITH THE OTHER LANDS, and THEIR FORMER APPRAISED VALUE.*"

At a meeting of the Directors on the 9th of *April, 1788*, at which the Governor and five members (all of whom, except one, appear to be now dead) were present, it was resolved, that, pursuant to the preceding act, a deed ought to be executed to *P. Turpin*, for conveying and releasing to him and his heirs, all the right, &c. of the Commonwealth, in and to all the lands belonging to the said *P. Turpin*, appropriated by the Directors of the Public Buildings for the use of the public, *except the two acres ceded to the General Assembly by the said P. Turpin, which the Directors are of opinion ought to be laid off so as to include the garden used at present by the Governor, as annexed to his house.*

These are the only documents exhibited in the record which have any *legal operation and effect* in the case before us. I therefore throw out of consideration the subject of Doctor *Turpin's* various petitions to the General Assembly, and the reports of the committees thereon; as also Doctor *Turpin's* overtures, communicated through Col. *Goode*; and whatever that gentleman or Mr. *Hay* may suppose to have been the effect of these overtures on the opi-

nions of the Directors, individually ; since we have no other evidence of their collective and *legal* agency, than what appears from the portion of the record which I have extracted.

The case thus stript of all extraneous matter, seems to be very short and simple. By the emanation, execution, and return of the writ in the nature of a writ of *ad quod damnum*, due solemnities being observed, (of which there is no evidence in this record, nor any complaint that they were not observed,) the title of Doctor *Turpin*, was in the language of the act, IMMEDIATELY DIVESTED AND TRANSFERRED to the COMMONWEALTH, IN FULL AND ABSOLUTE DOMINION. From that moment Doctor *Turpin* had no more right or title to the lands *themselves*, than any other citizen of the Commonwealth ; of course, any overtures of his, to give to the Commonwealth *such and such a particular spot*, unless such gift had been *accepted* by the General Assembly, or *authorised* by them, was as vain, as if he had offered them the dominion of any other State, or of any Principality or Kingdom in *Europe*. He was entitled to *compensation*, according to the estimate of the Jury, for all the lands which were taken from him, but to nothing more. This compensation was, by the original law, in which no alteration seems to have been made, to have been paid by the treasurer to him, *on warrant from the Auditors*. Whether he ever *applied for*, or obtained, or was *refused* a *warrant* for the same, at any time, does not appear. He seems to have preferred addressing himself to the Legislature, to pursuing the course pointed out for making him compensation. If he neglected to apply to the Auditors for a warrant, that neglect puts an end to his claim for compensation, by way of *interest*, on the amount of the original valuation of the Jury. By asking and accepting the return of the lands, which were deemed unnecessary for the public use, he must be considered as waiving also all compensation in the nature of *damages*, for taking the lands for that purpose, except such as the Legislature might, in their discretion, make him for the same. And if, after the decision of the Directors was known to him, he had had it in his

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own power to ascertain the value of the two acres retained, and to get paid for them, as directed by the original act of Assembly, I am inclined to think *that* circumstance would, in a Court of Judicature, have deprived him of any right to interest, even upon the sum at which the lot reserved might have been valued. For the public so far differs from a private debtor, that the latter is bound to seek his creditor to save his penalty, or to avoid the payment of interest upon a just and liquidated debt, ordinarily carrying interest. But the public is under no such obligation; and if the payment be delayed ever so long, it is no reason for giving interest against the public, unless the debt was liquidated, and the money demanded; nor then, perhaps, in a Court of Judicature, unless the law expressly authorises the allowance of interest, or the payment on demand; because it is a principle in public polity, which cannot be departed from, (at least by the Courts of the State against which a claim is preferred,) that sovereign States can only be bound according to the tenor of their own engagements. Now here is no provision in the law, for the payment of interest upon the original valuation. And, though as a legislator, I should undoubtedly give it, in the present case, on the value of the lot reserved, from the time it was first taken for public use; as a Judge, I think I cannot, except from the period when the Directors of the Public Buildings, pursuant to the authority given them by the act of 1787, had located (if I may use the expression) the particular spot they meant to reserve for the use of the Commonwealth, and had released the residue to Doctor Turpin. The valuation of the part to be reconveyed, as directed by that act, (if it had been made, as it ought to have been, by order of the Directors,) must have ascertained the value of the part reserved; and having been neglected by the Directors, Doctor Turpin, from that period, could not apply to the Auditor for a warrant for his money, because the amount was uncertain, and continued uncertain through the default of the agents of the Commonwealth. From that period, therefore, I consider his right to interest

(a) Vide 3 as commencing. (a)

Call, 175, 179.

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Upon the merits, so far as they are within the power of this Court to minister relief, I conceive Doctor *Turpin* entitled to full compensation for the value of the two acres reserved, as the same may be ascertained by a Jury, pursuant to the directions contained in the act of 1787, c. 78. with interest as just mentioned. But the points made by the Attorney-General make it necessary to consider, whether, upon the *present* proceedings, we can even grant relief so far.

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The principle contended for by the Attorney-General, and admitted, I believe, by every writer on the law of nations, is, that the Commonwealth can neither be made liable to its own citizens, *in its own Courts*, beyond the tenor of its own engagements, nor be sued *in its own Courts* in any other manner than what the law expressly permits. The former of these principles was certainly recognised in the case of the *Commonwealth v. Colquhoun* and others, last April term. (a) I do not know whether there has been any express decision in respect to the latter. In the case of *Beaumarchais v. the Commonwealth*, (b) this Court was unanimously of opinion, that an appeal lies from the decision of the Auditor, to the High Court of Chancery, or to the *Richmond* District Court, according to the nature of the case, in all cases whatsoever. But that is not the present case. Doctor *Turpin* does not appear to have made any application to the Auditor for a warrant; nor is this case founded upon an appeal for a refusal. It is an *original bill in Chancery*, (in the usual form as against private defendants,) exhibited against the *Attorney-General* of the Commonwealth, and praying that he may make answer to all and singular the matters and things therein contained; but it does not demand such answer to be made on OATH, in which it differs essentially from ordinary bills. The act concerning the Auditor and Treasurer, not only allows an *appeal* from the judgment of the Auditor in matters of account, but allows a PETITION in all other cases, to the High Court of Chancery, or the District Court, holden at the City of *Richmond*, to ANY PERSON who is entitled to demand against the Commonwealth, ANY RIGHT IN LAW

(a) 2 Men. &  
Munf. 213.

(b) 3 Call,  
129.

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(a) *L. V.* edit.  
1794, c. 85.  
s. 6.

OR EQUITY.(a) That the *Attorney-General* should have notice of all such petitions, is a point not to be controverted ; and though, perhaps, some serious objections might have been made to the present mode of proceeding, if, being called upon to answer upon oath, he had refused to do so, and any steps had been taken, as in ordinary cases, in consequence of his not *answering*, yet, as nothing of that kind has occurred in the present case, I am unwilling to take any exception against the form of the proceedings, though I am not inclined to establish them as a precedent in cases which may hereafter arise.

Judge ROANE. This is a bill brought by the appellee against the Attorney-General, in the High Court of Chancery. After having shewn, in certain, how the lot of land in controversy, (the Governor's garden,) formerly his property, became vested in the Commonwealth ; it having been appropriated and condemned by the Directors of the Public Buildings, and afterwards commuted by them for another lot given by him to the public in consideration of erecting the public buildings thereon, which condition, however, was never complied with ; he prays that the donation lot may be restored to him without retaining compensation in the lot (the garden) now in question ; that compensation may be made him for the loss sustained by the diminution in the value of his land, (thirty acres,) detained for a considerable time by the public, and, afterwards, except the lot in question, restored to him ; and for general relief. The prayer is, therefore, substantially, either for the garden itself, specifically, or its value, in consequence of the grounds of equity on which his claim is founded ; and for compensation for the injury as aforesaid. On none of those grounds, except for the *value* of the lot, could an application to the Auditor have been proper ; nor, indeed, was it proper as to it, considering that the question respecting it arose out of a complication of facts and circumstances, making it a fit case for the exclusive cognisance of a judicial tribunal ; and, especially, as no apportionment of the value of that lot had

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ever taken place, whereby the Auditor would have been enabled to ascertain the extent of the claim. The non-existence of such apportionment, while it presents an insuperable bar to the progress of the Auditor, shews the necessity for an application to a Court of Equity.

This then being a case in which an application neither was, nor properly ought to have been made to the Auditor in the first instance, a question arises whether the ordinary jurisdiction of the Court of Equity ceases to exist, as to it, in consequence of the sovereign character of the *Commonwealth*.

In the case of the *Commonwealth v. Beaumarchais*, it was held, with great force and justice, by this Court, that every just government ought to provide a tribunal competent to decide *all* claims and demands against itself. The President, in delivering his opinion in that case, *seems* to put the petition of appeal from the decision of the Auditor upon the ground of the petition of right in *England*; and adds, that, although in high prerogative times, it was held necessary that the king should underwrite, "*let justice be done to the party*," yet that *that* has been long dispensed with, and the petition of right resorted to as an *ordinary proceeding*. In that case indeed, it was not *particularly* decided (because it was unnecessary) that the latter part of the sixth section of the Auditor's law (a) extended to cases other than *pecuniary*, or to cases in which a resort to the Auditor was not proper in the first instance. It is certain, however, that the general scope of the decision seems to go that length; and most of the counsel on both sides seem to have considered that part of the section as properly applying to cases not of a *pecuniary* nature.

(a) *Rev. Code*,  
v. 1. p. 140.

There can certainly be no good reason with a just government why this should not be the case; and the words are extremely comprehensive. The clause is, "where the Auditor, acting according to his discretion and judgment, shall disallow, or abate any article of demand against the Commonwealth, and any person shall think himself aggrieved thereby, he shall be at liberty to petition the High



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(a) Ch'rs.  
Revisal, p.  
84.

“ Court of Chancery, or the District Court, holden at the city  
“ of *Richmond*, according to the nature of his case, for re-  
“ dress; and such Court shall proceed to do right thereon;  
“ and a like petition shall be allowed in all other cases to any  
“ other person who is entitled to demand against the Common-  
“ wealth any right in law or equity.” This section is literally  
taken *mutatis mutandis* from the 5th section of the Auditor’s  
law of 1778.(a) Under the act of 1778, the jurisdiction of  
the Courts might be less clear than under the act of 1792, in  
a case like the present; for as that act had, in a previous  
section, pointed out the cases, *particularly*, in which the au-  
ditor should act, it might have been argued that the *general*  
words, now in question, were put into embrace other cases  
of like character, which had not been enumerated. But  
those general words are kept up in the act of 1792, after a  
*general grant* of power to the Auditor to settle and audit  
“ all claims and demands whatsoever against the public, ari-  
“ sing under any law or resolution whatsoever.” The  
first part of the 6th section allowing a petition is commen-  
surate with this power, and grants redress where it is abu-  
sed: the latter words, therefore, mean nothing, unless they  
go beyond it. The expression “like petition,” only means  
a petition to the Court of Chancery or District Court, re-  
spectively, as the case may be, and is not tied down to the  
case of a claim rejected by the Auditor. A broader privi-  
lege is granted by the justice of the Legislature; that any  
person entitled to demand “*any right in law or equity*”  
against the Commonwealth, may prefer his petition, and that  
the proper Court shall “*proceed to do right thereon.*” The  
actual case before us has a strong analogy to those in which  
petitions of right are proper and admissible in *England*:(b)  
the legislative provision now in question may be considered  
as a *general* license “that justice shall be done the party:”  
and the legislature, having thus attained the essence of the  
transaction, is regardless of form. Consequently it does  
not adopt the modes and forms of proceedings in *England*,  
applicable to petitions of right, but allows a party to pro-  
ceed as in other cases by a bill in equity: such has been

(b) See 3 Bl.  
Com. 256

the uniform practice on this subject from the beginning, and there is no doubt but that the term "petition" may well be satisfied by a bill in equity.

I shall therefore consider this case as if the appellant were a private person ; and this brings us to the merits.

With respect to the plea and demurrer in this case, they were both rightly overruled : the first, because an application to, and decision by, the Legislature, is no bar to the equity of this Court ; (a) and the last, because, if the appellee has any title to the lot in question, it is an *equitable* one only, and not a legal one.

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(a) *Commonwealth v. Beaumarchais.*

I will next consider the case upon the *answer* and proofs. The donation of the two acres was made on a condition, which has failed ; or, at least, under a *belief* entertained by one party, and communicated to and not gainsayed by the other. Col. *Goode* was a Director at the time, and acted as the friend and agent of *Turpin* in making the offer of the donation, and his testimony is strong to the above effect. Mr. *Hay* was not a Director *at the time*, and nothing said by him, or any other, can do away the above result as depending on *Goode's* testimony. In the event that happened, that the Public Buildings were not placed on *Turpin's* land, he did not contract to cede to the Commonwealth any thing. The Directors therefore were mistaken in 1783 in considering the two acres as a *donation*, and commuting it for the lot in question. Yet they considered (under the act of 1787) the lot in question as *necessary* for the public use ; they have not reconveyed it ; and, thinking it necessary, ought not to have reconveyed it : but Mr. *Turpin* is entitled to be paid for it, as if the donation of the other lot had never been made.

In consequence of the Directors' restoring to *Turpin* all his other lands, under the act of 1787, except the lot in question, and retaining it as a *donation*, *Turpin* was to receive no money from the public, and therefore, I presume, no valuation has been made as directed by the act of 1787 : it was to no purpose to value and apportion the land, as *Turpin* was to receive nothing therefor. The Directors having

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erred to his prejudice, as above mentioned, I am of opinion that the lot in question (or the returned land, it is immaterial which) should be valued by the rule laid down by that act, and *Turpin* be paid therefor, with interest from the date of the act of 1787. As to *prior* interest, it is not shewn that application was made by *Turpin* for the money which, under the act of 1778, he was entitled to demand from the public. It further appears, that up to that time *Turpin* was willing to consider the appropriation and valuation of his land as not *conclusive*, and was ever willing, and perhaps desirous, to take back such part of his land as was not wanting for the use of the public. Being, therefore, perhaps, not desirous to receive the money, and, in fact, not having applied therefor, he is not entitled to interest. As to any loss sustained in the sale of his land, in consequence of the detention of it by the public, the act authorising a reconveyance to him thereof was founded on his application. He petitioned to take back the land; and this must be considered as a relinquishment of any damages accruing to him from the detention, if, in fact, there were any.

Upon the whole, I am of opinion that *Turpin* is entitled to a decree for the value of the lot in question, with interest from the date of the resolution of the Directors by which the two acres were retained for the use of the public; and that the decree of the Chancellor should therefore be reversed, and reformed pursuant to the foregoing ideas.

Judge FLEMING. Concurring with the other Judges on the merits of this cause, I have only to pronounce the following decree, which has been agreed upon as the unanimous opinion of the Court. The Court is of opinion, "that the decree of the Superior Court of Chancery is erroneous in this, that the appellee is not entitled to the relief given by the said decree; therefore it is decreed, &c. that the same be reversed, &c. and that the appellee pay to the appellant the costs, &c. And this Court proceeding, &c. is further of opinion, that by the emanation, execution, and return of the writ of *ad quod damnum*, in the record men-

tioned, the title of the appellee was immediately divested and transferred to the Commonwealth in full and absolute dominion; and therefore that any overtures, or promises, made by him to cede to the public any particular spot within the area of the lands comprised within the inquisition taken upon the said writ, or the price thereof, unless the same had been accepted by the agents of the Commonwealth duly authorised, and the condition annexed to such cession duly complied with, were not binding on the said *Philip Turpin*, or the Commonwealth, and ought to be wholly disregarded. The appellee according to the terms of the act before mentioned, was, immediately upon the return of the inquisition to the clerk's office, entitled to demand a warrant from the Auditor, and to receive payment from the Treasurer, for the price of the lands comprised in the inquisition aforesaid. He does not appear to have made any application therefor: by which neglect, as well as by asking from the General Assembly, the return of the lands which should be deemed unnecessary for the public use, he must be considered as waiving all right to interest on the principal sum, and as waiving also all compensation, in the nature of damages, from the Commonwealth, for taking and detaining the lands for public use, except such compensation as the General Assembly might, in their discretion, choose to make him for the same. When the Directors of the Public Buildings, pursuant to the act passed in 1787, intituled 'An act authorising the Directors of the Public Buildings in the city of *Richmond*, to convey to *Philip Turpin* certain lands,' declared, by a resolution of the 9th of *April*, 1788, that a deed ought to be executed for conveying and releasing to him and his heirs, all the right of the Commonwealth in and to all the lands comprised in the inquisition aforesaid, except two acres, which the said Directors were of opinion ought to be laid off so as to include the garden used at present by the Governor, as annexed to his house, they ought to have had the same immediately laid off, by metes and bounds, and caused the residue of

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“ the lands comprised in the inquisition aforesaid to be valued by a jury, as part of the lands in the first, or second lot specified, in the original inquisition of the 8th of January, 1803. [1783,](1) (according as it shall appear to the said Superior Court of Chancery, that the said two acres were a part of the lands contained in the said first or second lot, or in both,) on the principles stated in the aforesaid act of 1787, and such valuation to be returned to the Court of *Henrico* County; which sum, being deducted from the original valuation of the whole tract, would have ascertained the amount of the principal money due and payable to the said *Philip Turpin* for the two acres retained, as aforesaid; but the said Directors having neglected to do so, the appellee had it not in his power, thereafter, to demand a warrant from the Auditor, or, payment from the Treasurer for the value of the said two acres reserved for public use. From that period, therefore, this Court is of opinion that the appellee is entitled to interest as a compensation, for the delay of payment, which did not happen from his own default or neglect, as before mentioned; therefore, it is decreed and ordered, that the Commonwealth pay to the appellee, the value of the said two acres, retained for public use, to be ascertained by a jury as aforesaid, with interest thereon, at the rate of five per centum per annum, from the ninth day of *April*, 1788, until the same shall be paid. And the cause is remanded to the Superior Court of Chancery aforesaid, for a decree to be made therein, pursuant to the principles of this decree.”

(1) It is 1803, in the order book, but it is evidently a mistake. It should be 1783.

Wilkinson against Mayo.

Tuesday 25th  
April, 1809.

THIS was a *supersedeas* to a judgment of the District Court of *Richmond*, by which a judgment of the County Court of *Powhatan* was reversed.

*Joseph Mayo*, at the *December* term, 1805, made application to the Court of *Powhatan* County, for leave to erect a water grist-mill, on *Mahook* creek, the bed whereof was stated to belong to himself, and that he owned the lands on both sides. A writ of *ad quod damnum* was thereupon issued, in the manner prescribed by law, which having been duly executed on the 11th day of *January*, 1806, was returned, with an inquisition annexed, to the *January* Court, which was held on the 15th of the month; and thereupon it was ordered, that *Thomas Wilkinson*, the proprietor of the lands, which, it appeared by the inquisition, would be overflowed by the mill-pond, should be summoned to the next Court, (which, in *Powhatan*, is a *quarterly* term,) to shew cause why *Mayo* should not have leave to erect his mill &c. at which Court, *Wilkinson*, being summoned, appeared; and, on hearing the parties, by their counsel, the writ of *ad quod damnum*, and inquisition thereupon, were quashed, "it appearing to the Court, that a part of the dam of the applicant, will run upon the lands of the said *Wilkinson*." From which order, *Mayo* appealed to the District Court; where the same was reversed, at the costs of *Wilkinson*, the Court being of opinion, "that the County Court had no jurisdiction over the cause, at the term when the same was decided." On the first application to the Court of Appeals, for a *supersedeas* to the last-mentioned judgment, the motion was denied; but, afterwards, the Court doubting on the subject, it was granted.

The County or Corporation Courts, at quarterly terms, may, in their discretion, receive the probate of deeds, or wills, or decide on controversies concerning mills, &c. or, indeed transact any business embraced by the general jurisdiction of such Courts; but, at a monthly session, they cannot take jurisdiction of any case expressly and exclusively assigned to a quarterly term.

If the applicant for leave to build a mill state, that he is the owner of the land on both sides of the water-course, when, in truth, he is not, the writ of *ad quod damnum* and inquisition taken upon it, ought to be quashed.

*Samuel Taylor*, for the plaintiff in error. There are two points in this cause. 1st. Whether the County Court had jurisdiction over the case of a mill at a quarterly term? and,

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1809.

Wilkinson

v.  
Mayo.

(a) Rev.  
Code, v. 1. p.  
84, 85.

2dly. Whether the District Court did not err in awarding costs against *Wilkinson*?

The first point will depend on the true construction of the 5th, 7th, and 8th sections, of the act by which the present jurisdiction of the County Courts is defined. (a) By the 5th section, a *general* jurisdiction is given to the County Courts; the 7th section prescribes the *ordinary* jurisdiction of those Courts at the *quarterly terms*; and, though there are no express words in this section giving jurisdiction in case of mills, yet there are *no* negative words. Under the 8th section, the *monthly Courts* are restrained by negative words from exercising the powers given to the quarterly Courts: certain acts are enumerated, which the Justices at their monthly sessions *may* perform; and they are *prohibited* from doing such business as is particularly assigned to the quarterly Courts; but no such exception or restriction exists in the 7th section. The true reasons of the Legislature, (as may be seen in the preamble to the act of 1785,) (b) were to separate the *trial of causes*, from the ordinary business of the Court. Anterior to that act, they were only *monthly* sessions of the Court, and the docket business was often interrupted. It was merely to enable the Court to proceed with that kind of business, with more regularity, that *quarterly* terms were established. But it was still discretionary with them to proceed on other objects embraced by the general jurisdiction of the Court.

(b) o. 8.

The practice of the country is strongly in favour of the exposition which I have given. It has been the universal practice, since 1785, to admit wills and deeds to record, at a quarterly term; and, generally, to transact any other business, within the general jurisdiction of the Court, which might be done, without interfering with the business of the docket. If then there remained a doubt upon the subject, the necessity of quieting rights, would induce the Court to lean in support of the practice.

On the second point, the District Court certainly erred, in awarding costs against *Wilkinson*. He was summoned to shew cause, at a quarterly term, at the instance of *Mayo*.

He was made a party contrary to his inclination ; and must either have submitted to a judgment against him, unheard and undefended ; or have appeared, and contested. If the Court had no jurisdiction, the party ought surely to pay the costs who improperly brought him into it.

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*Call*, for the defendant in error. This is a question growing out of the plain words of an act of Assembly ; and the whole difficulty arises from confounding the *ancient* with the *present* jurisdiction of the County Courts.

By the act of 1785, a new jurisdiction of the *quarterly* Courts was created ; not a mere abrogation of the *monthly* Courts : and it is a rule of law that where a Court is instituted with particular jurisdiction, it can exercise none but that expressly given. Before that act, the *quarterly* Courts could try *any matter* ; but this act confined the jurisdiction to *particular* causes : and by the repealing clause, all other laws on the subject were repealed. How then can it be said, that a *quarterly* Court may exercise a jurisdiction under a pre-existing law ?

The explanatory act of 1787<sup>(a)</sup> declares, that *March, May, August and November*, shall be *quarterly* terms, for the trial of certain causes ; all other causes to be tried at the *monthly* Courts ; and where the Legislature mean that they shall exercise concurrent jurisdiction they say so, in express terms, and enumerate the cases. There are certain cases in which the monthly and quarterly Courts have concurrent jurisdiction ; certain others, in which the monthly Courts have sole jurisdiction ; certain others, where the jurisdiction is exclusively given to the quarterly courts ; but in no part of any law can it be found, that the quarterly Courts may exercise jurisdiction over a mill case. How is it possible, then that a quarterly Court can exercise a jurisdiction expressly given to a monthly Court ?

<sup>(a)</sup> *Session Acts*, c. 10.

It may be objected, that a purchaser may lose his land, if a deed could not, in some cases, be recorded at a quarterly Court ; because eight months would expire before the succeeding monthly Court. But there is no want of Courts



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1849.

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in this country for recording deeds ; since it may be done in the General Court, the District Court, or the Court of the County where the land lies ; and, if these are not enough, the inconvenience must be remedied by the Legislature. The jurisdiction for proving and recording deeds is expressly given to the monthly Courts, and therefore, I contend, cannot be exercised by a quarterly Court. But, perhaps, as to *deeds*, the general words of the act for regulating conveyances, may vary the effect of those used in the 8th section of the County Court law, and authorise their being recorded at *any* Court, whether monthly or quarterly, within the *eight* months.

The object of the Legislature was to prevent any interruption to the trial of pleas between parties. No reason can be given for taking up questions concerning mills, which does not equally apply to all other cases. Will the Court then give a construction which will entirely frustrate the intention of the Legislature ?

As to the costs, it is admitted that *Mayo* can only recover the costs of the reversal, and not the costs in the County Court.

*Taylor*, in reply. The principal point, on which Mr. *Call* relies, is, that by the act of 1785, constituting *quarterly* Courts, a new jurisdiction was created. But this idea is erroneous. The Court was composed of the same Judges, without the grant of any new powers. If there had been a newly created Court, there must have been new commissions to the magistrates : which was not the case. There was, indeed, an alteration in the terms of the Court, but no new powers were conferred ; nor was the general jurisdiction of County Courts abridged.

The Legislature, it is true, at the last session, passed an explanatory law respecting the probate of deeds and wills, and the granting of letters of administration at the quarterly terms.<sup>(a)</sup> But no decision of this Court rendered such an act necessary. *Doubts* might have been entertained, as expressed in the preamble of the act ; but they were the *doubts*

(a) See acts  
of 1808, c. 25.  
p. 33.

of inferior Courts ; and until a law is expounded by the highest judicial tribunal, it is never deemed to be settled.

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*Friday, April 28.* The Judges gave their opinions.

Judge TUCKER. On the 18th day of *December*, 1805, *Mayo* petitioned the County Court of *Powhatan* for leave to build a mill ; and thereupon a writ of *ad quod damnum* was awarded, executed and returned to *January* Court ; whereupon it was ordered, that *Thomas Wilkinson*, the proprietor of the lands, which it appeared by the inquisition would be overflowed by the mill-pond, should be summoned to appear at the *next Court*, to shew cause, &c. at which Court, *Feb. 19th*, 1806, *Wilkinson*, being summoned, appeared, and on hearing the parties by their attorneys, the writ of inquisition was quashed ; *it appearing to the Court that a part of the dam of the applicant will run upon the lands of the said Wilkinson.*

The suggestion of *Mayo* when he applied for leave to build a mill, that he owned the lands on both sides *Mahook* creek, the bed whereof belonged to himself, being disproved (as it would seem) by evidence offered on shewing cause, there can be no doubt that, upon the merits, the judgment of the County Court was correct.

But it is suggested, that *February* Court, to which *Wilkinson* was summoned to shew cause, being a *quarterly* Court, the County Court had not *jurisdiction* over the case at that term, when the case was decided ; and for this cause the judgment was reversed, with costs, by the District Court.

But, which of the parties was in fault ? The summons must have been awarded on the motion of *Mayo*, in *January* ; and, being issued and served on *Wilkinson*, he must either have appeared to shew cause against the application, or have lost his land, without compensation.

I cannot consider this as a question of *jurisdiction*, strictly. The Court obtained jurisdiction over the case regularly in *December*, and its proceedings were regular at that term, and in *January*, except in directing that *Wilkinson* should be

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(a) *Vi. L. P.*  
c. 11. 1793. c.  
67. sect. 1, 2,  
3. 5. 7, 8, 9,  
in which the  
words, the  
said Courts,  
are constantly  
used, and re-  
peated.

(b) *Vi. 1 Call*,  
336.

*summoned to shew cause at the next Court, which happened to be a quarterly term, instead of a monthly one. The error, if one, in awarding the summons to be made so returnable, proceeded from Mayo, and must have been founded upon his motion. Is he entitled to take advantage of his own error? I think not; the cause being once regularly in Court, could not, I think, be said to be coram non judice, although the summons were directed to be returnable to a wrong term: at least, Wilkinson alone had a right to complain, that he was not summoned to the proper term. For the monthly and quarterly Courts are all the same Courts, (a) consisting of the same Judges, appointed and sitting by virtue of the same commissions, and qualifications. Their original constitution as Courts of Record, for the counties respectively, has never been altered, although their terms have been varied, and the course of business in many respects regulated by statutory provisions. Under these provisions it would certainly be error to try an ejectment at a monthly Court, because the law expressly declares, that such trials shall be had at the quarterly terms. But there is a maxim in law, consensus tollit errorem, which might, perhaps, (for I mean not to give an opinion on the point,) cure the error, if the consent appeared upon the record. (b) Wilkinson having obeyed the summons, without objecting to the irregularity of it, and Mayo being present by his attorney, and both parties being heard upon the merits, without objection from either, surely that party, from whom all the irregularity proceeded, had no right to complain of that irregularity, when judgment was pronounced against him. Under all the circumstances of the present case, I think the judgment of the County Court was right, and therefore ought to be now affirmed—and that of the District Court reversed.*

Judge ROANE. The writ of *ad quod damnum* and inquisition in this case were rightly quashed by the County Court, for the reason given, if that Court had at the time, a competent jurisdiction to hear and determine the controversy.

On a deliberate consideration of the several acts on this subject, I am of opinion that the County Courts are not prohibited from acting, at the quarterly sessions, on the subjects embraced by the general jurisdiction of such Courts, by any provision contained in those acts. Indeed, the importance of many of such controversies may have weighed with the Legislature to confide them, the rather, to the quarterly sessions, which are probably better attended by justices and counsel, than the monthly Courts : at any rate, however, I see nothing to prohibit the quarterly Courts from acting on the subject, and therefore that the judgment of the District Court should be reversed.

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1809.  
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Judge FLEMING. On the 18th day of *December*, 1805, *Joseph Mayo* made application to the County Court of *Powhatan*, for leave to erect a water grist-mill on *Mahook* creek, stating that he was owner of the lands on both sides of the said creek, the bed whereof belonged to himself ; and obtained a writ of *ad quod damnum* to issue, agreeably to the act of Assembly concerning mills, &c. which writ having been duly executed on the 11th of *January*, 1806, was returned to Court, with an inquisition annexed, on the 15th day of the same month, and ordered to be recorded ; and *Thomas Wilkinson*, the proprietor of the land which will be overflowed by the said pond, was ordered to be summoned to the next Court (which was the Court of Quarter Sessions for the County) to shew cause, &c. at which Court *Wilkinson* appeared, in obedience to the summons, and the Court proceeded to trial.

From this statement of the case, two questions arise.

1st. Whether the Court had jurisdiction of the case, at a quarterly session ? and if so,

2dly. Whether the judgment is erroneous on its merits ?

1st. With respect to the point of jurisdiction. The preamble of the act of 1785, for reforming the County Courts, which was the foundation of the present system, shews the principal object of the Legislature. It recites that, "WHERE-  
" As the methods hitherto established for the administration

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“ of justice within this Commonwealth, have proved ineffectual, and the various kinds of business, cognisable by the County Courts render it necessary that certain sessions of the said Courts should be set apart for the trial of *suits*, depending in the said Courts, and other sessions for the transaction of other business ;—Be it enacted,” &c.

In the act of *December*, 1792, for reducing into one the several acts on the subject, it is enacted, section 7th, that Courts of *quarter sessions* shall be held, in the respective Counties, for the trial of all presentments, criminal prosecutions, suits at common law, and in Chancery, where the sum exceeds twenty dollars, or eight hundred weight of tobacco, and shall continue for the space of six days, unless the business be sooner determined.

Sect. 8th. A monthly session shall be held, &c. for the trial of petitions for small debts ; or for trover and conversion, or detention of any thing not exceeding twenty dollars, or eight hundred pounds of tobacco ; for proving and recording deeds and wills, and granting certificates of *probate* and administration, and for the transaction of all business, which by law is, or shall be, made cognisable in a County or Corporation Court, except such as has been herein assigned to the Court of quarter sessions. *Provided nevertheless*, that injunctions in Chancery, and several other enumerated cases, may be heard and determined, either at a monthly or quarterly Court. But the case of controversies about mills is not one of those enumerated in the *proviso*, giving concurrent jurisdiction to the monthly and quarterly Courts : notwithstanding which, as there are no restraining words in the law, prohibiting the Courts of quarter sessions from hearing and deciding those cases, (in doing which they may use their own discretion,) I can see no good reason why they should not do so, if they find leisure for the purpose ; as the monthly, and quarter session Courts are composed of the same members, acting under the same commission, and holding their respective sessions at the same place. Different, indeed, would the case be, if a monthly Court

should hear and determine a cause particularly assigned to a Court of quarter sessions ; and why ? because there is an express exception of such cases in the eighth clause of the act.

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The principal object of the law, in discriminating the business of the monthly, from the quarter session Courts, was, that the business of inferior consideration should not interfere with, and clog the business of superior importance; but, if the latter Courts find they have sufficient time (in the course of six days, being the time which those Courts are by law to continue, unless the business be sooner finished) to do both, I am of opinion that they have jurisdiction to do so, especially in cases of contests about mills, where expedition is necessary, for the convenience of the parties. And it seems strange to me, that the appellee in this case, the *prime mover* of the business. (who set out in error, by misstating his case, and dragged the appellant into the Court of quarter sessions against his will,) should now except to the jurisdiction of the Court, which heard and decided the cause, at his particular instance and request.

The proving and recording deeds, and wills, is a business particularly assigned to the monthly Courts, and not mentioned in the proviso giving concurrent jurisdiction to both Courts. I will suppose, for example, that *Wilkinson* had conveyed his land to *Mayo*, by deed, dated the 17th of *June*, 1805, and had acknowledged it in Court, or it had been proved by three witnesses, on the 16th of *February*, 1806, the day the controversy about the mill was decided, which would have been one day within eight months from the date, I have no hesitation in saying that, in my opinion, it would have been as valid, to all intents and purposes, as if it had been acknowledged, or proved, at the first monthly Court after it was executed : and I believe *Mr. Mayo* would have been of the same opinion.

If the Court of quarter sessions would have had jurisdiction to receive the probate of the deed and admit it to record, I see no reason why it should not have had jurisdiction in the case before us.

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As to the merits of the case, I concur with the Judges in the following opinion, which has been unanimously agreed to.

“ This Court is unanimously of opinion, that there is  
“ error in the judgment of the District Court, in this, that  
“ the appellee, on his first application to the County Court of  
“ *Powhatan*, for leave to build a mill on *Mahook* creek,  
“ stated that he was owner of the lands on both sides of the  
“ said creek, (the bed whereof belongeth to himself,) when  
“ it appeared in evidence, that a part of the dam of the ap-  
“ plicant will run on the lands of the appellant *Thomas Wil-*  
“ *kinson*: the said judgment is therefore reversed with  
“ costs ; and that of the County Court affirmed ; and the  
“ petition of the appellee, and the subsequent proceedings  
“ thereon in the County Court, ordered to be dismissed.”

VIRGINIA, to wit:

*At a General Court held at the Capitol, in Richmond, the 11th day of June, 1808.*

The Commonwealth *against* Josiah M'Clenegan.

UPON an adjourned case from the District Court held at *Morgan Town*.

“ The court are unanimously of opinion, that where an indictment or presentment is found by a Grand Jury against any person for a misdemeanor, to which the law has affixed an infamous or corporal punishment, that the Court before whom such presentment or indictment is found, may, in its discretion award a *capias* in the first instance ; and that, upon indictments and presentments of an inferior nature, such Court ought, after two *venire facias*'s have been returned not found, to award a *capias* ; it is therefore ordered, that it be certified to the *Morgan Town* District Court, that a *capias* ought to be awarded in this case.”

What process ought to be awarded upon an indictment or presentment for a misdemeanor.

*A copy.*

Teste,

WILSON ALLEN, C. G. C.





# AN INDEX

## TO

### THE PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

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1. A general acceptance of an order binds the acceptor to the *payee*, by whom

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1. If something agreed on, by the parties to marriage articles, at the time, was omitted through *fraud* or *accident*, *parol*, or other evidence *dehors* the articles, is admissible to supply the defect. See MARRIAGE ARTICLES, No. 3. *Tabb and others v. Archer and others,* 400

## ACCOUNTS.

1. It is not sufficient, in an account, to charge balances of other accounts as rendered and agreed, without producing the accounts so alleged to have been agreed, (if in existence,) and proving them as alleged, unless there be proof of the defendant's acknowledgment of the justice of such accounts, or of his promise of payment. *Lewis's Ex'r v. Bacon*, &c. 89
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3. An action cannot be maintained by a mercantile company on a bond payable to A. F. individually, without averring in the declaration the said bond to have been given to A. F. for their use, or to have been assigned to them by A. F. or by his legal representatives. *Gordon et al. v. Browne's Ex'r*, 219
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2. The lawful emanation, execution and return of a writ of *ad quod damnum*, to value land intended to be applied to public uses, immediately divests the title of the individual owner to the land so valued, and transfers it to the Commonwealth in full and absolute dominion; such owner remaining entitled only to the valuation money and damages assessed by the jury. *The Attorney-General v. Turpin*, 548
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4. If the applicant to build a mill, state that he is the owner of the land on both sides the water-course, when, in truth, he is not, the writ of *ad quod damnum* and inquisition taken upon it, ought to be quashed. *Wilkinson v. Mayo*, 565

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2. An agreement concerning the purchase of lands, perfected by the execution of a conveyance on the part of the seller, and by acceptance thereof, and payment of the purchase-money, or execution of a bond or bonds for the same, on the part of the purchaser, is final and conclusive between the parties and their heirs, in law; and ought not to be disturbed in equity, unless fraud, or some manifest mistake in such conveyance, or bond, be shewn and proved; or unless some note or memorandum in writing be made, pursuant to the statute of frauds and perjuries (if subsequent to that statute) at the time, or after the execution of such conveyance or bond, whereby it may appear that the parties had agreed to some further explanation or modification of the terms of the agreement as therein specified. *Vance v. Walker*, 288
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1. Though an answer be filed, and no plea in abatement to the jurisdiction of the court, still if the bill, upon the face of it, present not a proper subject for a court of equity, it should be dismissed. *Pollard v. Patterson's Adm'r*, 67
2. In a suit against a person alleged to be a purchaser with notice, it is not sufficient for the defendant in his answer to say that he had no notice of a prior equity at the time of the purchase. It must appear whether he had obtained a conveyance before he received notice of the plaintiff's claim. *Hoover v. Donnally and others*, 316

APPEAL.

1. Prior to the act of 1807, the Court of Appeals had power to grant appeals from, or writs of *supersedeas* to, the several Superior Courts of Chancery, at any time within three years after such decrees were pronounced; and since the said act, any Judge of the Court of Appeals, out of Court, has the same power. *Tomlinson v. Dilliard, and Mackey v. Bell*, 199
2. An appeal having abated at March term by the death of the appellant, a *scire facias* to revive it was awarded at the ensuing October term. *Buster v. Wallace*, 217
3. The power of the Superior Courts of Chancery to grant appeals from interlocutory decrees, in certain cases, is not limited to the terms at which such decrees were rendered, but may be exercised at any subsequent term. *Wright v. Dawney*, 259
4. Where the appellee dies, the Court will not take up the appeal in the name of his executors, without giving the appellant notice by a *scire facias*; especially where a great length of

time has elapsed since the appeal.  
*Scott v. Adams,* 501

assignee of a title-bond. *Hoover v. Donnelly and others,* 316

### APPEALS, COURT OF

1. The Court of Appeals may grant appeals from decrees of a Superior Court of Chancery, or writs of error or *supersedeas*, at any time within three years; and any Judge of that Court, may do the same, *out of Court*, within the same period, notwithstanding the act of 1807. *Tomlinson v. Dilliard, and Mackey v. Bell,* 199
2. Practice of, in reversing judgments, where there has been an appeal from a County to a District Court, and the cause remanded for further proceedings. See JUDGMENT, No. 2. and *Lyon's Ex'r, &c. v. Gregory,* 237
3. If the Clerk of the Court of Appeals be directed, by the Court, to set aside a judgment, and, by misapprehension, the entry of the order be omitted, it may be done at a subsequent term, and the cause redocketed. *Beasley v. Owen,* 449

### APPEARANCE.

1. Appearance and pleading to the action, cures all errors in the process. *Turberville v. Long,* 309

### APPORTIONMENT OF RENT.

1. In an action of Debt for rent, the defendant, on the plea of *nil debet*, may give in evidence any special circumstance, shewing that the rent ought to be apportioned. *Newton v. Wilson,* 470
2. A lease was made of a mill, together with a tract of land adjoining, and a black man as miller, for a term of years, rendering an annual rent; the miller had, previously to the lease, been emancipated by the lessor by a deed entered of record, and, before the expiration of the first year, left the service of the lessee. It was held that the lessee was entitled to an apportionment of the rent, *Ibid.*

### ASSIGNEE.

1. Who ought to be parties to a bill, for a specific conveyance, brought by the

### ASSIGNEE OF A TERM.

1. Under what circumstances a subsequent lease, made by the landlord, of demised premises in the occupation of the assignee of a residue of the term, will not be deemed an eviction of the lessee, nor bar the landlord from recovering of him a balance due for rent on the original contract. *Cooke v. Wise,* 463

### ASSIGNMENT.

1. An assignee of a bond cannot sue as obligee, but must set forth the assignment in his declaration. *Gordon et al. v. Browne's Ex'r,* 219

### ATTORNEY-GENERAL.

1. Under what circumstances a bill exhibited against the Attorney-General requiring him to answer, (*but not upon oath*) will be regarded as a petition of right. *The Attorney-General v. Turpin,* 548

### AVERMENT.

1. The gist of the action must, in all cases, be directly and positively averred in the declaration; therefore, if, in *trespass*, the plaintiff declare "for that *whereas*," &c. and do not make a positive averment, it is error, and will not be cured by verdict. *Moore's Adm'r v. Dawney, &c.* 127
2. It is now settled that a declaration in *trespass*, or *case* for a tort, which begins "for that *whereas*," &c. and continues by way of *recital* to the end, is insufficient; and that such error is fatal after verdict or general demurrer. *Lomax v. Hord,* 271
3. What averment in a declaration is necessary where an action is brought by a mercantile firm, on a bond, given to a person individually. See *Gordon et al. v. Browne's Ex'r,* 219
4. It was not necessary, in actions in the District Courts, to aver in the declaration that the cause of action arose within the jurisdiction of the Court; but it seems, that such averment is necessary in actions in Corporation

Courts only. *Turberville v. Long*,  
9

B

BASE FEE.

1. Tenant in tail (before our act of assembly for docking entails) might, by a deed of bargain and sale, convey a base fee (a defeasible estate) voidable by the issue in tail, but not by himself. Therefore, a tenant in tail having bargained and sold to his own heir at law in fee, could not afterwards sue out a writ of *ad quod damnum* to bar the entail; being no longer seised of an estate tail, which was absolutely necessary to authorise him to sue out such writ. *Gleeson's Heirs v. Scott and others*, 278

BASTARDS.

1. An illegitimate child, born before the 1st of January, 1787, of parents who intermarried also before that period, (the father, who died in 1799, having recognised the child by his will as his own, though born before wedlock,) is entitled to an equal distribution of the father's unbequeathed estate, with his other children born after the marriage. *Rice et al. v. Efford et al.* 225. See also *Stones v. Keeling* 228. note, and *Sleighs v. Strider*, 229. note, in the former of which the issue of a marriage, deemed null in law, born before the passing of the act of 1785, the father dying afterwards, was held to be legitimate; and in the latter the same point occurred as in *Rice et al. v. Efford et al.*

BLANKS.

1. In an action of assault and battery, after a general verdict for the plaintiff, on the pleas of "not guilty" and "son assault demesne," judgment ought not to be arrested on the ground that the time was left blank in the declaration. *Digges v. Norris*, 268
2. After verdict, the damages having been left blank in the declaration, the court will inspect the writ and supply them from it, *Ibid.*

BILL, IN CHANCERY.

1. Ought to be dismissed, even "after answer filed and no plea in abatement

"to the jurisdiction of the Court," if, from the face of it, the subject was not proper for a Court of Equity. *Pollard v. Patterson's Adm'r*, 67

2. A bill exhibited in the High Court of Chancery, against the Attorney-General as representing the Commonwealth, but not requiring him to answer on oath, was, in this case, received as equivalent to a petition to that Court. *The Attorney-General v. Turpin*, 548

BILL OF EXCEPTIONS.

1. A paper intended as a bill of exceptions to an opinion of a District Court, (two Judges being present,) ought not to be considered as such, if not signed by both the Judges. *Gordon et al. v. Browne's Ex'r*, 219

BILL OF EXCHANGE.

1. See ACCEPTANCE, No. 1. *Corbin's Adm'r, v. Southgate*, 319
2. An action of debt will not lie against the acceptor of a bill of exchange. *Smith v. Segar*, 394

BOND.

1. Under circumstances, a written instrument was held to be a good bond, with collateral condition, though the obligor's name was not signed opposite to the seal, but between the penal part and the condition, and the name of the obligee was signed at the foot of the condition, with a seal annexed; both signatures being attested by the same witnesses. *Argenbright v. Campbell and wife*, 144
2. How an action may be brought by a mercantile firm, on a bond, given to A. F. individually; and what averments are necessary, in the declaration. See PLEADING, No. 6. *Gordon et al. v. Browne's Ex'r*, 219
3. An assignee cannot sue as obligee, but must aver the assignment in his declaration, *Ibid.*
4. What variance between the bond declared on and that given in evidence to the Jury, will be immaterial after a general verdict for the defendant, *Ibid.*

## BOUNDARIES.

1. A count, on a writ of right, referring to boundaries, as by a survey made in the cause, sufficiently describes the boundaries of the land in dispute. *Turberville v. Long*, 309

## C

## CANCELLING.

See REVOCATION.

## CAPIAS.

1. When a *capias* may be awarded, in the first instance, upon an indictment or presentment for a misdemeanor. *The Commonwealth v. McClenagen*, 575

## CERTIFICATE.

1. When a bare certificate of appointment is deemed equal to a commission. *Dew v. Judges Sweet Springs D. C.* 1

## CHANCERY.

1. The true construction of the 29th section of the act reducing into one the several acts concerning the High Court of Chancery (1 *Rev. Code*, p. 66.) is, that if it appear from the face of the will, that the matter is not proper for a Court of Equity, it should be dismissed; even "after answer filed, and no plea in abatement to the jurisdiction of the Court." *Pol-lard v. Patterson's Adm'r*, 67
2. The Courts of Chancery have jurisdiction in all cases where property taken in execution on behalf of the Commonwealth, is claimed by any person, under a mortgage or deed of trust; and if such mortgage or deed of trust be found not to have been duly recorded, may (notwithstanding no fraud be proved) decree the same to be void as against the claim of the Commonwealth. *Moore's Ex'r v. The Auditor*, 232

## CHANCERY, SUPERIOR COURTS OF.

1. The power of the Superior Courts of Chancery to grant appeals from interlocutory decrees, is not limited to the terms at which such decrees were rendered; but may be exercised at any subsequent term. *Wright v. Dancy*, 259

## CHARGE.

1. A specific fund was charged with the payment of debts, by will, and the general fund disposed of, after the payment of the testator's debts; held that the act of limitations barred a recovery out of the general fund, but not out of the specific. *Lewis's Ex'r. v. Bacon, &c.* 89

## CLERK OF COURT.

1. If illegally ousted from his office, the writ of *mandamus* is the proper remedy to restore him. *Dew v. Judges Sweet Springs, D. C.* 1
2. A person appointed Clerk of a District Court, in vacation, had the whole of the ensuing term to give bond and security. *Ibid.*
3. A certificate of appointment is sufficient: there need not be a commission "in the name of the Commonwealth," *Ibid.*
4. In what cases the omission of the Clerk of the Court of Appeals to set aside an order, may be corrected at a subsequent term. See APPEALS, COURT OF, No. 3. and *Beasley v. Owen*, 449

## COMMISSION.

1. A certificate, that S. D. is appointed Clerk, &c. signed and sealed by a majority of the Judges of the General Court, (without styling themselves such,) is a sufficient commission; and it need not run "in the name of the Commonwealth;" nor mention that the vacancy happened between terms and term; nor state the tenure of the office. *Dew v. Judges Sweet Springs D. C.* 1

## COMMONWEALTH.

1. The Courts of Chancery have jurisdiction in all cases where property taken in execution on behalf of the Commonwealth, is claimed by any person under a mortgage or deed of trust; and, if such mortgage or deed of trust be found not to have been duly recorded, may (notwithstanding no fraud be proved) decree the same to be void as against the claim of the Commonwealth. *Moore's Ex'r v. The Auditor*, 232

2. The remedy given by the 6th section of the act passed the 15th of December, 1792, "to reduce into one the several acts concerning the Auditor and Treasurer," is not confined to matters of account, but extends to every right in law or equity which any person is entitled to demand of the Commonwealth. *The Attorney-General v. Turpin*, 548
3. A bill exhibited in the High Court of Chancery, against the Attorney-General as representing the Commonwealth, but not requiring him to answer on oath, was, in this case, received as equivalent to a petition to that Court, *Ibid.*
4. Appointment of a Clerk of a District Court, need not be by commission, running in the name of the "COMMONWEALTH." See COMMISSION, No. 1. and *Dew v. Judges Sweet Springs D. C.* 1

#### COMPOUND INTEREST.

- What deemed such. See *Lewis's Ex'r v. Bacon, &c.* 89

#### CONSIDERATION.

1. See MARRIAGE, No. 1. SLAVES, No. 3.
2. When a parol promise before marriage will be a sufficient consideration to sustain a written agreement afterwards; or, if the marriage be had on the father's request. *Argenbright v. Campbell and wife*, 144
3. A general acceptance of an order binds the acceptor to the payee, by whom the same was taken, bona fide, and for a valuable consideration paid by him; notwithstanding the consideration which induced the acceptance afterwards fails, without any fault on the part of the payee. *Corbin's Adm'r v. Southgate*, 319

#### CONSTRUCTION.

1. In the construction of agreements, the whole must be taken together. *Tabb and others v. Archer and others*, 400  
— of the rule as to allowing one term to prepare for trial, after new parties are made. *Scott v. Adams*, 501
2. Of acts of Assembly. See STATUTES, CONSTRUCTION OF.
3. Of the 6th section of the act passed the 15th of December, 1792, "to re-

"duce into one the several acts concerning the Auditor and Treasurer." *The Attorney-General v. Turpin*, 548

#### CONTRACT. See AGREEMENTS. MARRIAGE, No. 1. SLAVES, No. 3.

1. An indorsement made on articles by the husband and wife, subsequent to the marriage, can neither be regarded as a part of the original contract, nor as explanatory thereof. *Tabb and others v. Archer and others*, 400

#### CONTRACTS.

1. Infants may contract by marriage articles or settlements, and such contracts will bind them when of full age. *Tabb and others v. Archer and others*, 400
2. See INFANTS, No. 2. MARRIAGE ARTICLES, 1, 2, 3, 4, 5, 6, 9, p. 400.
3. In the construction of agreements, the whole must be taken together. *Tabb and others v. Archer and others*, 400

#### CONVEYANCE.

1. Where husband and wife sue, in right of the wife, for a title to a tract of land, the conveyance should be decreed to be made to the wife only. *Argenbright v. Campbell and wife*, 144
2. In a suit against a person alleged to be a purchaser with notice, he must shew on his part that he had obtained a conveyance before he received notice; it not being sufficient that he had no notice at the time of the purchase. *Hoover v. Donnelly and others*, 316
3. Any conveyance made after marriage by the husband and wife, or either of them, with intention to defeat the rights of those entitled to the benefit of marriage articles, will be set aside by a Court of Equity. See MARRIAGE ARTICLES, No. 2. *Tabb and others v. Archer and others*, 400

#### CORPORATION COURTS.

1. It seems that an averment that the cause of action arose within the jurisdiction of the Court, is necessary in actions in Corporation Courts only. *Turberville v. Long*, 309



2. As to jurisdiction at quarterly terms. 2. Not affected by a deed of trust or mortgage of a slave or other personal estate, (not having notice,) unless the same be proved by three witnesses; or acknowledged by the party, and duly recorded. *Moore's Ex'rs. v. The Auditor*, 232
- See COUNTY AND CORPORATION COURTS, and *Wilkinson v. Mayo*, 565

## COUNT.

1. What circumstances are sufficient to cure the omission to mention in the count, on a writ of right, the County where the land lies. *Turberville v. Long*, 309
2. A count, on a writ of right, referring to boundaries, as by a survey made in the cause, sufficiently describes the boundaries of the land in dispute, *Ibid.*

## COUNTY AND CORPORATION COURTS.

1. May decree that a defendant residing within their limits shall convey lands lying in another County or Corporation, and enforce the decree upon the person of such defendant only; but such decree does not of itself vest any legal title; nor can it be received as evidence of such, upon the trial of an ejectment. *Aldridge et al. v. Gile's et al.* 136
2. The County and Corporation Courts, at quarterly terms, may, in their discretion, receive the probate of deeds or wills, or decide controversies concerning mills, &c. or, indeed, transact any business embraced by the general jurisdiction of the Courts; but, at a monthly session, they cannot take jurisdiction of any case expressly and exclusively assigned to a quarterly term. *Wilkinson v. Mayo*, 565

## COURT OF APPEALS.

See APPEALS, COURT OF.

## CREDITORS.

1. Under what circumstances, slaves sent by a father to his daughter's husband, immediately after the marriage, will be presumed a gift in consideration of the marriage; and the rights of the husband's representatives (no fraud appearing) will be protected against the claims of the father's creditors, though the slaves had not been three years in the possession of the son-in-law. *Moore's Adm'r v. Dawney, &c.* 127

## DAMAGES.

1. After verdict, in an action of trespass, assault and battery, the damages having been left blank in the declaration, the Court will inspect the writ, and supply them from it. *Digges v. Norris*, 268
2. Interest is not recoverable, by way of damages, in an action of debt for rent arrear. *Cooke v. Wise*, 463. *Newton v. Wilson*, 470
3. If the damages be laid high enough in the writ, though the Jury find more than are laid in the declaration, the writ may be referred to for the purpose of amendment, and the judgment will be sustained. *Palmer and Eubank v. Mill*, 502
4. See AD QUOD DAMNUM, No. 2, 3. *The Attorney-General v. Turpin*, 548
5. See REVALUATION, No. 1. *Ibid.*

## DATE.

1. After a general verdict for the plaintiff, in an action of trespass, assault and battery, on the pleas of "not guilty," and "son assault demeine," judgment ought not to be arrested, on the ground that the time when the assault was committed, was left blank in the declaration. *Digges v. Norris*, 268

## DEBET AND DETINET.

1. The declaration against an Executor, suggesting a *devastavit*, must be in the *debet* and *detinet*, to entitle the plaintiff to recover judgment *de bonis propriis*: if it be in the *detinet* only, he may have judgment *de bonis testatarius*. *Spotswood v. Price, &c.* 123

## DEBT.

- An action of debt will not lie against the acceptor of a bill of exchange. *Smith v. Segar*, 394

DEBTS.

1. A testator devised a *particular* fund for the payment of his debts; and further directed, (*after payment of his just debts*) that the *general* fund should be equally divided among his sons; held that the act of limitations barred a recovery out of the *general* fund, but not out of the *particular*. *Lewis's Ex'r v. Bacon, &c.* 89

DECLARATION.

1. Must be in the *debet* and *detinet* against an executor, suggesting a *devastavit*, to entitle the plaintiff to a judgment *de bonis propriis*; if it be in the *detinet* only, he may have judgment *de bonis testatoris*. *Spotewood v. Price, &c.* 123
2. Must be direct and positive; if, therefore, in *trespass*, the plaintiff declare "for that *whereas*," &c. and make no positive averment, it is error, and will not be cured after verdict. *Moore's Adm'r v. Dawney, &c.* 127
3. So, in *case* for a tort, if the declaration continue by way of recital to the end. *Lomax v. Hord,* 271
4. What averment, in the declaration, is necessary, where a suit is brought by a mercantile firm, on a bond given to a member of the firm individually. See *Gordon et al. v. Browne's Ex'r,* 219
5. In an action of assault and battery, after a general verdict for the plaintiff on the pleas of "*not guilty*" and "*son assault demesne*," judgment ought not to be arrested on the ground that the *time* was left blank in the declaration. *Digges v. Norris,* 268
6. After verdict, the damages, having been left blank in the declaration, the Court will inspect the writ, and supply them from it. *Ibid.*
7. It was not necessary, in actions in the District Courts, to aver in the declaration, that the cause of action arose *within the jurisdiction of the Court*; but it *seems*, that such averment is necessary in actions in *Corporation Courts* only. *Turberville v. Long,* 309
8. If the damages be laid high enough in the *writ*, though the Jury find more than are laid in the *declaration*, the writ may be referred to for the purpose of amendment, and the judgment will be sustained. *Palmer and Eubank v. Mill,* 502

VOL. III.

DECREE.

1. A decree of a County Court requiring a defendant residing within its limits to execute a conveyance for lands lying in another county, can be enforced upon the *person* of such defendant *only*, and does not of itself vest any legal title in the complainant. If offered as *evidence of such title*, in an action of ejectment, it ought not to be received. *Aldridge et al. v. Giles et al.* 136
- Quare.* How far it is admissible; and whether as evidence of a legal title, or only as matter of *inducement*. *Id. id.*
2. A *decree*, that, unless the defendant answer the bill before a certain day, then the tract of land, in the bill mentioned, shall be surveyed, and part thereof allotted to the complainant, and that the defendant shall execute to the complainant a legal conveyance for such part, and pay the costs of suit, is not *final*, but *interlocutory*, only. *Ibid.*
3. Where husband and wife sue, in right of the wife, for a title to a tract of land, the conveyance should be decreed to be made to the wife only. *Argenbright v. Campbell and Wife,* 144

DEEDS.

See QUARTERLY COURTS. JURISDICTION. RECITAL.

DEMURRER.

1. Though no demurrer be filed to a bill for want of equity, and no plea in abatement to the jurisdiction of the Court, yet if, after answer filed, it appears that the subject was not proper for a Court of Equity, the bill shall be dismissed. *Pollard v. Patterson's Adm'r,* 67
2. A declaration in trespass, charging "for that *whereas*," &c. and continuing by way of recital to the end, is bad after general demurrer. *Moore's Adm'r v. Dawney, &c.* 127

DETINET.

1. If the declaration against an executor, suggesting a *devastavit*, be in the *detinet* only, the plaintiff cannot recover judgment *de bonis propriis*, but he may have judgment *de bonis testatoris*. *Spotewood v. Price, &c.* 123

E

## DETINUE.

1. Five years' possession of a slave, will entitle a plaintiff in detinue, who had lost the possession, to recover; but without prejudice to the titles of those who were not parties to the suit. *Newby's Adm'r v. Blakey*, 57

## DEVASTAVIT.

1. If an executor obtain a judgment, for a debt due to his testator, against the administrator of the debtor, to be levied of the goods and chattels of the intestate, &c. and afterwards bring an action of debt against the administrator, suggesting a *devastavit*, and declare in the *detinet* only, he cannot have judgment *de bonis propriis* of the administrator, but only *de bonis testatoris*. *Spotswood v. Price*, &c. 123
2. To entitle the plaintiff to judgment *de bonis propriis*, in such case, he ought to declare in the *debet* and *detinet*, *Ibid.*

## DEVISE:

1. A testator devised a large real and personal estate to his wife and children; charged the portion of one of his sons with the payment of 15,000*l.* sterling towards his debts, directed sundry tracts of land to be sold, and the monies arising therefrom, as well as from loan-office certificates, or otherwise, (*after payment of his just debts*,) to be equally divided among his six sons. On a bill brought by one of the creditors of the testator, the statute of limitations being pleaded, and the complainant not having shewn that he came within any of the exceptions of the act, it was held that the statute ought not to operate to prevent a recovery of so much of the *specific* fund as remained undisposed of, but that it would be a bar to a recovery out of the general fund. *Lewis's Ex'r v. Bacon*, &c. 89

## DOWER.

1. Before our act of Assembly, (of 1785, which took effect the 1st of *January*, 1787,) giving a widow dower of a *trust* estate, she could not be endowed of an *equitable* estate. *Claiborne and Wife v. Henderson*, 321

## E

## EJECTMENT.

1. On the trial of, a decree of a County Court, directing a defendant residing within its jurisdiction to convey *lands* lying in another County, cannot be given in evidence as passing any *legal* title; such decree may, however, be enforced upon the *person* of the defendant. *Aldridge et al. v. Giles et al.* 136

## EQUITABLE ESTATE.

1. Before our act of Assembly, (of 1785, which took effect the 1st of *January*, 1787,) giving a widow dower of a *trust* estate, she could not be endowed of an *equitable* estate. *Claiborne and Wife v. Henderson*, 321

## EQUITY.

1. The true construction of the 29th section of the act for reducing into one the several acts concerning the High Court of Chancery (1 *Rev. Code*, p. 66.) is, that if it appear from the face of the bill, that the matter thereof is not proper for a Court of Equity, it should be dismissed even "after answer filed, and no plea in abatement" to the jurisdiction of the Court." *Pollard v. Patterson's Adm'r*, 67
2. A mistake in a writing referring to another, may, in a Court of Equity, be corrected by the writing referred to. *Argenbright v. Campbell and Wife*, 144
3. When agreements concerning lands perfected by a conveyance, &c. may be modified in equity, and when not. See AGREEMENT, No. 2. and *Vance v. Walker*, 288
4. If a derivative purchaser, by assignment of a title-bond, file his bill against the vendor, for a specific conveyance, the first purchaser or his representatives ought to be made parties. *Hoover v. Donnelly and others*, 316
5. In a suit against a person alleged to be a purchaser *with notice*, it is not sufficient for the defendant in his answer to say, that he had no notice of a prior equity at the time of the *purchase*. It must appear whether he had obtained a *conveyance* before he received notice of the plaintiff's claim, *Ibid.*
6. See EQUITABLE ESTATE, No. 1. and *Claiborne and Wife v. Henderson*, 321

7. Under what circumstances the purchaser of an agreement for a lease, shall not have the aid of a Court of Equity to enforce a specific performance. *Jones's Devises v. Roberts*, 436
8. Marriage articles are considered as the heads or minutes, only, of an agreement entered into between the parties, upon a valuable consideration, (the marriage,) and, being in their nature executory, ought to be construed and moulded, in equity, according to the intention of the parties at the time of concluding them. *Tabb and others v. Archer and others*, 399
9. Equity will enforce marriage articles, at the suit of the issue, (whether in esse, or in ventre sa mere,) or of any other persons for whose benefit they were intended, against the husband and wife, or any person claiming by a conveyance from them or either of them. *Ibid*, 400
10. In such case, the Court will either compel performance (by appointing trustees where none were inserted in the articles, and decreeing a settlement,) or set aside any conveyance made with intent to defeat the rights of the issue, or of those in remainder, expectant on the estate for life of the husband and wife, *Ibid*.
11. Where, by consent of the original owner, part of land taken for public use, was directed, by a law, to be revalued and restored to him, and the residue to be retained by the Commonwealth; but through the default of the agents of the Commonwealth, such revaluation has not been made; the Court of Chancery should direct it now to be made, and decree the value so ascertained, (of the residue,) with interest, from the time when such revaluation ought to have taken place, to be paid by the Commonwealth, to such original owner. *The Attorney-General v. Turpin*, 548

#### ERROR.

##### See JUDICIALS.

1. If the original writ be lost, so that it cannot be made a part of the record, the Court will intend, after verdict, that it was a good writ, though some of the subsequent process be erroneous. *Turberville v. Long*, 309
2. Appearance and pleading to the action cures all errors in the process, *Ibid*.
3. If the Clerk of the Court of Appeals be directed by the Court to set aside a

judgment, and, by misapprehension, the entry of the order be omitted, it may be done at a subsequent term, and the cause redocketed. *Beasley v. Owen*, 449

#### ESTATES-TAIL.

1. Tenant in tail (before our act of Assembly for docking entails) might, by a deed of bargain and sale, convey a base fee (a defeasible estate) voidable by the issue in tail, but not by himself. Therefore, a tenant in tail having bargained and sold to his own heir at law, in fee, could not afterwards sue out a writ of *ad quod damnum* to bar the entail; being no longer seized of an estate tail, which was absolutely necessary to authorise him to sue out such writ. *Gleeson's Heirs v. Scott and others*, 278

#### EVICITION.

1. What circumstances will not amount to an eviction of the lessee by the landlord. See LEASE, No. 1. and *Cooke v. Wise*, 463

#### EVIDENCE.

1. An *ex parte* affidavit taken in London, prior to the American revolution, pursuant to the act of Parliament, (5 Geo. II. c. 7. sect. 1.) "for the more easy recovery of debts in his majesty's plantations in America," cannot be admitted as evidence to charge the defendant in this country. *Lewis's Ex'r v. Bacon, &c.* 89
2. It is not sufficient in an account to charge balances of other accounts as rendered and agreed, without producing the accounts so alleged to have been agreed, (if in existence,) and proving them as alleged, unless there be proof of the defendant's acknowledgment of the justice of such accounts, or of his promise of payment, *Ibid*.
3. A decree of a Court of a County requiring a defendant residing within its limits to execute a conveyance for lands lying in another County, can be enforced upon the person, only, of such defendant, and does not of itself vest any legal title in the complainant. It offered as evidence of such title in an action of ejectment, it ought not to be received. *Aldridge et al. v. Giles et al.* 136

*Quere.* For what purpose, and to what extent could it be received as evidence in such action. *Aldridge et al. v. Giles et al.* 136

*Quere.* Is a decree of a Court of Equity for a conveyance of lands lying within its jurisdiction admissible in an action of ejectment between the parties to such decree, or persons claiming under them, as evidence of a legal title, or only as matter of inducement to other evidence, *Ibid.*

4. Where the records of a Court have been destroyed, an *imperfect* minute of a judgment may be admitted to record under the act of Assembly, in lieu of the original; provided the *substantial* parts appear; and the record of such minute made by order of Court, is good evidence on the plea of *ul tiel record.* *Lions, Ex'r, &c. v. G'ory,* 237

5. Under what circumstances evidence is admitted in a Court of Equity, to relieve against an agreement concerning lands, perfected by a conveyance, &c. See AGREEMENT, No. 2. and *Vance v. Walker,* 288

6. The declaration in an action for slander charging the defendant with having said that the plaintiff, as a witness before a Court of Record, was guilty of perjury, "for which he would have *"his ears,"* the defendant, on the plea of justification, cannot give *parol* evidence of what the plaintiff swore to, without producing a copy of the record of that trial to shew that the testimony given by the plaintiff was material to the matter in question. *Kirtley v. Deck,* 388

7. In an action of debt for rent, the defendant, on the plea of *nil debet*, may give in evidence any special circumstance shewing that the rent ought to be apportioned. *Newton v. Wilson,* 470

8. *Parol* or other evidence *dehors* marriage articles, to explain, or vary their meaning, ought not to be resorted to, unless there be some *latent* ambiguity, or something agreed on by the parties at the time, omitted through fraud or accident. *Tabb and others v. Archer and others,* 400

9. *Parol* evidence is admissible to shew *quo animo* a will was cancelled. See REVOCATION. *Bates v. Holman,* 502

## EXCEPTING CLAUSE.

1. In what instance recourse may be had to an *excepting clause* to prevent the *universality* of the *recital*, in the commencement of an agreement, from being restricted by a subsequent *specification.* See RECITAL. *Tabb and others v. Archer and others,* 400

## EXCEPTIONS.

See BILL OF EXCEPTIONS.

## EXCHANGE.

See BILL OF EXCHANGE.

## EXECUTORS AND ADMINISTRATORS.

1. If a suit in Chancery abate by the death of the defendant, *after answer filed*, and the cause set for hearing; it seems that his executor cannot regularly demur to the equity of the bill, or plead any matter which the testator himself might not have pleaded in that stage of the proceedings; but, if no objection be made, and the parties afterwards proceed to take depositions, it will be an implied waiver of such irregularity. *Pope, &c. v. Towles, &c.* 47
2. In declaring against, suggesting a *devastavit*, the judgment will depend upon the charge in the declaration; if it be in the *debet* and *detinet*, there may be judgment *de bonis propriis*; if simply in the *detinet*, there can only be judgment *de bonis testatoris.* *Spotswood v. Price, &c.* 123
3. An administrator, who declares, in trespass, for breaking *his* close, and taking away slaves belonging to the estate of his intestate, will be intended, after verdict, to have been in possession, for the purpose of finishing the crop, by virtue of the act of Assembly. *Moore's Adm'r v. Darroney, &c.* 127
4. Where the appellee dies, the Court will not take up the appeal, in the name of his executors, without giving the appellant notice by a *scire facias*;

especially, where great length of time has elapsed since the appeal. *Scott v. Adams*, 501

F

FALSE IMPRISONMENT.

1. Trespass, assault and battery and false imprisonment, will not lie against the plaintiff for suing out a writ of *capias ad satisfaciendum*, and causing the defendant to be taken in execution, while he was attending Court, as a witness, under the protection of a *subpoena*, although the debt for which the execution issued had been previously satisfied. *Moore v. Chapman*, 260
2. Nor can any action be sustained, as it seems, till the process of execution be quashed or superseded, *Ibid.*

FATHER.

1. The law has entrusted the father or guardian with the marriage of infant children or wards; and, consequently, settlements made by infants through the father or guardian are binding. *Tabb and others v. Archer and others*, 400

FORFEITURE.

1. The purchaser of an agreement for a lease, and those under whom he claims, having committed such acts as would have amounted to a forfeiture, had a lease been actually executed with such covenants as were usually inserted in leases to other tenants of the same estate, shall not have the aid of a Court of Equity to enforce a specific performance, against a judgment at law recovered by a purchaser of the fee-simple estate. *Jones's Devisees v. Roberts*, 436
2. The acceptance of rent after a forfeiture accrued, is an equivocal act, and may, or may not, amount to a waiver of the forfeiture, according to the *quo animo* with which the rent was received, *Ibid.*

FEE-TAIL.

See ESTATES-TAIL.

FRAUD.

1. Is one of the grounds upon which an agreement concerning lands, perfected by a conveyance, &c. may be relieved against in equity. See AGREEMENT, No. 2. and *Vance v. Walker*, 288
2. If something agreed on, by the parties to marriage articles, at the time, was omitted by fraud or accident, parol, or other evidence dehors the articles, is admissible to supply the defect. See MARRIAGE ARTICLES, No. 3. *Tabb and others v. Archer and others*, 400

FRAUDS, STATUTE OF.

1. See EVIDENCE. MARRIAGE ARTICLES.
2. A note or memorandum in writing, within the meaning of the statute of frauds, made at the time, or after, of perfecting an agreement concerning lands, by a conveyance, &c. is one of the grounds to authorise relief against such agreement in equity. See AGREEMENT, No. 2. and *Vance v. Walker*, 288
3. See GIFT, No. 2. *Beasley v. Owen*, 449

FRAUDULENT GIFTS OF SLAVES.

1. Under what circumstances slaves sent by a father to his daughter's husband, immediately after the marriage, will be presumed a gift in consideration of the marriage; and the rights of the husband's representatives (no fraud appearing) will be protected against the claims of the father's creditors, though the slaves had not been three years in the possession of the son-in-law. *Moore's Adm'r v. Dawney, &c.* 127

G

GENERAL COURT.

1. Practice settled in, as to process upon an indictment or presentment for a misdemeanor. See THE COMMON-WEALTH v. *McClennan*, 575

GENERAL RULES.

See RULES. PRACTICE.

## GIFT.

1. Under what circumstances slaves sent by a father to his daughter's husband, immediately after the marriage, will be presumed a gift, *in consideration of the marriage*; and the rights of the husband's representatives, (no fraud appearing) will be protected against the claims of the father's creditors, though the slaves had not been three years in the possession of the son-in-law. *Moore's Adm'r v. Dawney, &c.* 127
2. A testator having verbally lent a slave, reserving the right to take him back whenever he should think proper, his last will and testament, recorded four years after such loan, was a sufficient declaration of a gift, within the meaning of the statute of frauds, to protect the right of the donee, in opposition to the creditors of the person to whom the loan had been made. See WILLS, No. 1. *Beasley v. Owen,* 449

## GUARDIAN AND WARD.

1. The law has entrusted the father or guardian with the marriage of infant children, or wards; and, consequently, settlements made by infants through the father or guardian are binding. *Tabb and others v. Archer and others,* 400

## H

## HUSBAND AND WIFE.

1. Where husband and wife, sue in right of the wife, for a title to a tract of land, the conveyance should be deemed to be made to the wife only. *Argenbright v. Campbell and Wife,* 144
2. Cannot, after the marriage, rescind marriage articles, even by consent, or by any conveyance which they, or either of them, can make. *Tabb and others v. Archer and others,* 400
3. An indorsement made, on articles, by the husband and wife, subsequent to the marriage, can neither be regarded as a part of the original contract, nor as explanatory thereof. *Ibid,* 400
4. The husband, on the marriage, being a purchaser for a valuable consideration,

cannot be deprived of any of his legal rights, accruing by the marriage; except such as, (according to a just and liberal construction of the articles,) he must be understood and intended to have given up: if, then, there be any chasm in the articles, whereby the legal rights of the husband may, in certain events, interpose between the uses declared by them, a Court of Equity, in directing the settlement, ought to have regard to those legal rights, so as to preserve to the husband the enjoyment thereof, on the happening of such event; and the same construction ought to be made, in relation to the wife's legal rights, either accruing on the marriage, or existing antecedent thereto, and independent of it. *Tabb and others v. Archer and others,* 400

4. It having been agreed, by marriage articles, that all the estate, real and personal, of the wife, should remain in her right and possession during the marriage, and that the profits only should be applied to the support of the husband and wife, and their issue, if any; and it having been further agreed, that the husband would never sell or dispose of any part of the said estate, but that the same should always be held as an inviolable fund for the support of the said husband and wife and their issue, if any there should be; the first clause was construed as containing a declaration of the uses of the estate during the coverture only; and the second clause as declaring the uses afterwards. The husband, therefore, as well as the wife, was adjudged to be entitled to the benefit of these uses for life. *Ibid.*
5. See MARRIAGE ARTICLES, No. 7, 8, 9. *Ibid.*

## I

## ILLEGITIMATE CHILDREN.

See BASTARDS.

## INDICTMENT.

1. What is the proper process on an indictment or presentment for a misdemeanor. *The Commonwealth v. McClenegan,* 575

INDORSEMENT.

1. An indorsement made on articles by the husband and wife, *subsequent* to the marriage, can neither be regarded as part of the original contract, nor as explanatory thereof. *Tabb and others v. Archer and others*, 400

INFANTS.

1. May contract by marriage articles or settlements, and such contracts will bind them when of full age. *Tabb and others v. Archer and others*, 400
2. The law has entrusted the father, or guardian, with the marriage of infant children or wards; and, consequently, settlements made by infants through the father or guardian, are binding, *Ibid.*

INTENDMENT.

1. An administrator who declares in trespass, for breaking *his* close and taking away slaves belonging to the estate of his intestate, will, after verdict, be *intended* to have been in possession, for the purpose of finishing the crop, by virtue of the act of Assembly. *Moore's Adm'r v. Dawney*, 127
2. If the original writ be lost, so that it cannot be made a part of the record, the Court will *intend* after verdict, that it was a good writ, though some of the subsequent process be erroneous. *Turberville v. Long*, 309
3. See WRIT OF RIGHT, No. 3.

INTENTION.

1. Of parties to marriage articles, from what to be collected. See MARRIAGE ARTICLES, No. 3.
2. In what cases *parol* or other evidence *dehors* the articles, is admissible to explain or vary their meaning, *Ibid.*

INTEREST.

1. What deemed compound interest. *Lewis's Ex'r v. Bacon, &c.* 89
2. Is not recoverable, by way of damages, in an action of debt for rent-arrear. *Cooke v. Wise*, 463. *Newton v. Wilson*, 470

3. Is not to be allowed on the valuation money or damages assessed by a Jury on a writ of *ad quod damnum*, to value land intended to be applied to public uses, unless the claimant applied to the Auditor for his warrant and was refused it; or, having obtained it, was refused payment at the Treasury. *The Attorney-General v. Turpin*, 548
4. But where, by the consent of the original owner, part of the land taken for public use was directed, by a law, to be revalued and restored to him, and the residue to be retained by the Commonwealth; but, through the default of the agents of the Commonwealth, such revaluation has not been made; the Court of Chancery should direct it now to be made, and decree the value so ascertained, (of the residue,) with interest, from the time when such revaluation ought to have taken place, to be paid by the Commonwealth to such original owner, *Ibid.*

5. See REVALUATION,

INTERLOCUTORY DECREE.

1. A decree that, unless the defendant answer the bill before a certain day, then the tract of land in the bill mentioned shall be surveyed, and part thereof allotted to the complainant, and that the defendant shall execute to the complainant a legal conveyance for such part, and pay the costs of suit, is not *final*, but *interlocutory*, only, *Aldridge et al. v. Giles et al.* 136
2. The power of the Superior Courts of Chancery to grant appeals from interlocutory decrees, is not limited to the terms at which such decrees were rendered, but may be exercised at any subsequent term. *Wright v. Dawney*, 259

ISSUE.

1. Marriage articles may be enforced, in equity, at the suit of the *issue*, whether *in esse* or *in ventre sa mere*. See MARRIAGE ARTICLES, No. 2.
2. Where the limitation, in marriage articles, is to the *issue* generally, the children born of the marriage, though purchasers, yet take *as coparceners*, *per stirpes*, and not *per capita*, *Ibid.*



## ISSUE, IN PLEADING.

1. There were two counts in a declaration, the one beginning in *covenant*, and concluding in *case*; the second altogether in *case*: there was but *one* plea; and that was to the count which began in *covenant*; held that the second count was unanswered, and no issue joined upon it. After general verdict for the plaintiff, judgment arrested, and a repleader awarded. *Terrelle v. Page's Adm'r*, 118
2. The difference between an *informal* and an *immaterial* issue. 120. note (1).

## J

## JEOfAILS.

1. Where, after verdict, the writ may be inspected, to supply the want of damages in the declaration. See *Digges v. Norris*, 268
2. If the original writ be lost, so that it cannot be made a part of the record, the Court will intend, after verdict, that it was a good writ, though some of the subsequent process be erroneous. *Turberville v. Long*, 309
3. Appearance and pleading to the action cures all errors in the process, *Ibid.*
4. What circumstances are sufficient to cure the omission to mention in the count on a writ of right, the County where the land lies, *Ibid.*
5. If the record of proceeding on a writ of right state, that the demandant "*replied generally*," the Court will intend, after verdict, that a general replication was filed in writing, *Ibid.*
6. The statute of *jeofails* extends to writs of right: therefore, if the verdict and judgment be *substantially right*, though not in the *words* of the law, they ought not to be disturbed, *Ibid.*
7. If the damages be laid high enough in the *writ*, though the Jury find more than are laid in the *declaration*, the writ may be referred to for the purpose of amendment, and the judgment will be sustained. *Palmer and Eubank v. Mill*, 502
8. See DECLARATION. VERDICT.

## JUDGES.

1. Any Judge of the Court of Appeals, out of Court, has power to grant an appeal from, or a writ of *superedeas* to,

a decree of a Superior Court of Chancery, at any time within three years, after such decree was pronounced, notwithstanding the act of 1807. *Tomlinson v. Dilliard, and Macker, v. Bell*, 199

## JUDGMENT.

1. A judgment *de bonis propriis*, cannot be entered against an executor, on a declaration, suggesting a *devastavit*, charging him in the *detinet* only; to entitle the plaintiff to judgment *de bonis propriis*, he ought to declare in the *debet* and *detinet*. *Sporewood v. Price, &c.*, 123
2. Where the judgment of a District Court, reversing that of a County Court, is not in its nature final, but remands the cause for further proceedings; and the subsequent judgment of the County Court is also reversed by the District Court, the Court of Appeals, if the *original judgment* of the County Court be correct, will reverse all the subsequent judgments, and affirm that *original judgment*. *Lyons, Ex'r, &c. v. Gregory*, 237
3. The act of 1792, for limiting the time within which a *scire facias* may be issued on a judgment, (1 Rev. Code. p. 108. sect. 5.) did not apply to a *scire facias* previously sued out, by leave of the Court, to revive a judgment which was more than ten years old when such lease was given, *Ibid.*
4. What variance between a judgment, and the recital thereof, in a *scire facias*, or in the judgment thereupon, is not material, *Ibid.*
5. Where the records of a Court have been destroyed by fire, an imperfect minute of a judgment may be admitted to be recorded, *Ibid.*
6. The statute of *jeofails* extends to writs of right; therefore, if the verdict and judgment be *substantially right*, though not in the *words* of the law, they ought not to be disturbed. *Turberville v. Long*, 309
7. If the Clerk of the Court of Appeals be directed by the Court to set aside a judgment, and, by misapprehension, the entry of the order be omitted, it may be done at a subsequent term, and the cause redocketed. *Beasley v. Owen*, 449
8. Though the verdict and judgment be for more damages than are laid in the

declaration, yet, if the damages were laid high enough in the writ, the judgment will be sustained. *Palmer and Kubank v. Mill*, 302

L

LANDLORD AND TENANT.

See RENT.

JURISDICTION.

1. After answer filed, and no plea in abatement to the jurisdiction of the Court, if it appear from the face of the bill that the subject was not proper for a Court of Chancery, the bill ought to be dismissed. *Pollard v. Patterson's Adm'r*, 67
2. A County Court may decree that a defendant residing within its limits shall convey lands lying in another County; but the decree can be executed on the person of such defendant only; it does not of itself vest any legal title, and cannot be received as evidence of a title in an ejectment. *Aldridge et al. v. Giles et al.*, 136
3. The Courts of Chancery have jurisdiction in all cases, where a deed of trust or mortgage is set up against a claim of the Commonwealth. See *Moore's Ex'r v. The Auditor*, 232
4. It was not necessary, in actions in the District Courts, to aver in the declaration that the cause of action arose within the jurisdiction of the Court; but it seems, that such averment is necessary in actions in Corporation Courts only. *Turberville v. Long*, 309
5. The County and Corporation Courts, at quarterly terms, may, in their discretion, receive the probate of deeds or wills, or decide on controversies concerning mills, &c. or, indeed, transact any business embraced by the general jurisdiction of the Court; but at a monthly Court, they cannot take jurisdiction of any case expressly and exclusively assigned to a quarterly term. *Wilkinson v. Mayo*, 565

JUSTIFICATION.

1. The word "justification," is not a sufficient plea to an action for slander. *Kirtley v. Deck*, 388. See PLEADING, No. 12.
2. What evidence is requisite to support such plea, where the declaration charges the defendant with having said that the plaintiff, as a witness before a Court of Record, was guilty of perjury, "for which he would have his ears." *Ibid.* See EVIDENCE, No. 6.

VOL. III.

1. Under what circumstances a subsequent lease, made by the landlord, of demised premises in the occupation of the assignee of a residue of the term, will not be deemed an eviction of the lessee, nor bar the landlord from recovering of him a balance due for rent on the original contract. *Cooke v. Wise*, 463
- See FORFEITURE, No. 1. ACCEPTANCE, No. 3. *Jones's Devises v. Roberts*, 436

LANDS.

1. Should be estimated in judging of the sufficiency of security. *Dew v. Judges Sweet Springs D. C.*, 1
2. A decree of a County Court may direct a defendant residing within its jurisdiction to execute a conveyance for lands lying in another County; but such decree can be enforced on the person only of the defendant; it cannot be given in evidence, on the trial of an ejectment, as passing any legal title. *Aldridge et al. v. Giles et al.*, 136
3. Agreements concerning, perfected by writing; when they may be modified, and when not. See AGREEMENT, No. 2. and *Vance v. Walker*, 288
4. The lawful emanation, execution, and return of a writ of *ad quod damnum*, to value land intended to be applied to public uses, immediately divests the title of the individual owner to the land so valued, and transfers it to the Commonwealth in full and absolute dominion; such owner remaining entitled only to the valuation money and damages assessed by the Jury. *The Attorney-General v. Turpin*, 548
5. Interest is not to be allowed on such valuation money or damages, unless the claimant applied to the Auditor for his warrant, and was refused it; or, having obtained it, was refused payment at the Treasury; but where, by the consent of the original owner, part of the land taken for public use was directed, by a law, to be revalued and restored to him, and the residue to be retained by the Commonwealth;

4 F

but, through the *default* of the agents of the *Commonwealth*, such revaluation has not been made; the Court of Chancery should direct it now to be made, and decree the value so ascertained, (of the residue,) with interest, from the time when such revaluation ought to have taken place, to be paid by the Commonwealth to such original owner. *The Attorney-General v. Turpin*, 548

## LEASE.

## See RENT.

1. Under what circumstances a subsequent lease made by the landlord, of demised premises in the occupation of the assignee of a residue of the term, will not be deemed an eviction of the lessee, nor bar the landlord from recovering of him a balance due for rent on the original contract. *Cooke v. Wise*, 463
2. A lease was made of a mill, together with a tract of land adjoining, and a black man as miller, for a term of years, rendering an annual rent; the miller had, previously to the lease, been emancipated by the lessor by a deed entered of record, and, before the expiration of the first year, left the service of the lessee. It was held that the lessee was entitled to an apportionment of the rent. *Newton v. Wilson*, 470
3. See SPECIFIC PERFORMANCE. FORFEITURE.

## LEGITIMATION.

1. Construction of the act of 1785, (1 Rev. Code, p. 170. sect. 19.) as to the legitimation of children born before marriage, of parents who afterwards intermarry and recognise them; also as to the issue of marriages deemed null in law. See *Rice et al. v. Efford et al.* 226. *Stones v. Keeling*, 228. note, and *Sleight v. Strider*, 229. note.

## LESSOR AND LESSEE.

## See RENT.

## LIMITATION.

1. A plaintiff, in detinue, who having had five years' peaceable possession of a slave, acquired without force or fraud, loses that possession, may regain it on the mere ground of his previous length of possession, on the same principle that a defendant may protect himself on that length of possession, under the act of limitations. But such recovery will not affect the rights of others not parties to the suit. *Newby's Adm'r's v. Blakey*, 57
2. If the defendant in equity plead the statute of limitations, and the complainant come within any of the exceptions in the act, he will not be entitled to the benefit thereof, unless he set it forth by a replication. *Lewis's Ex'r v. Bacon*, &c. 89
3. Under what circumstances the act of limitations held a bar to a recovery out of a general fund, though not out of a particular fund, after a devise for the payment of debts, *Ibid.*

## LOANS.

1. Construction of the statute of frauds and perjuries as to loans of slaves. *Beasley v. Owen*, 449
- See STATUTE OF FRAUDS, No. 2. *Ibid.*

## M

## MANDAMUS.

1. The writ of *mandamus* is the proper remedy to restore a Clerk ousted from his office, by the illegal appointment of another. *Dew v. Judges Sweet Springs D. C.* 1
2. If the original rule be to shew cause wherefore a *mandamus* shall not issue to admit the Clerk; the subsequent rule, or the *mandamus* founded thereon, may nevertheless be to restore him to the said office; for such rules may be changed and modified so as to square with the rights of the parties, and attain the real justice of the case, *Ibid.*
3. The person occupying the office ought to be made a party to the rule, or to the conditional *mandamus*, or such

rule ought to be served upon him, so as to enable him to defend his right before the peremptory *mandamus* issues. But if it appears from the record, that he was apprised of the proceedings and defended his right, it is sufficient. *Dew v. Judges Sweet Springs* D. C. 1

# MARRIAGE ARTICLES.

1. Marriage articles are considered as the heads or minutes only, of an agreement entered into between the parties, upon a valuable consideration, (the marriage,) and, being in their nature *executory*, ought to be construed and moulded, in equity, according to the intention of the parties at the time of concluding them. *Tabb and others v. Archer and others*, 399
2. The children born of the marriage are *purchasers*, under both father and mother, by virtue of marriage articles; yet, upon the death of father and mother, they take (where the limitation is to the issue generally) as *coparceners per stirpes*, and not *per capita*. Marriage articles are not to be rescinded, after the marriage, even by consent of the husband and wife, or by any conveyance which they or either of them can make; but may be enforced in equity, at the suit of the issue, (whether *in esse*, or *in ventre sa mere*,) or of any other persons for whose benefit such articles were intended: the Court will either compel performance, (by appointing trustees where none were inserted in the articles, and decreeing a settlement,) or set aside any conveyance made with intent to defeat the rights of the issue, or of those in remainder, expectant on the estate for life of the husband and wife. *Ibid.* 400
3. The intention of the parties to marriage articles, is to be collected from the nature of the agreement; the language and context thereof; the usage in similar cases; and the legal rights of the parties, as they existed before, and would have existed after, the marriage, if no such articles had been made: but *parol*, or other evidence, *dehors* the articles, to explain or vary their meaning, ought not to be resorted to, unless there be some latent ambiguity which is otherwise impossible to be solved or explained, or unless something agreed on by the parties at the time, has been omitted through fraud or accident. *Tabb and others v. Archer and others*, 400
4. An indorsement made on articles by the husband and wife, subsequent to the marriage, can neither be regarded as a part of the original contract, nor as explanatory thereof, *Ibid.*
5. The husband, on the marriage, being a purchaser for a valuable consideration, cannot be deprived of any of his legal rights, accruing by the marriage, except such as (according to a just and liberal construction of the articles) he must be understood and intended to have given up: if, then, there be any chasm in the articles, whereby the legal rights of the husband may, in certain events, interpose between the uses declared by them, a Court of Equity, in directing the settlement, ought to have regard to those legal rights, so as to preserve to the husband the enjoyment thereof, on the happening of such events. And the same construction ought to be made, in relation to the wife's legal rights, either accruing on the marriage, or existing antecedent thereto, and independent of it, *Ibid.*
6. It having been agreed, by marriage articles, that all the estate, real and personal, of the wife, should remain in her right and possession during the marriage, and that the profits only should be applied to the support of the husband and wife, and their issue, if any; and it having been further agreed, that the husband would never sell or dispose of any part of the said estate, but that the same should always be held as an inviolable fund for the support of the said husband and wife and their issue, if any there should be; the first clause was construed as containing a declaration of the uses of the estate during the coverture only; and the second clause as declaring the uses afterwards. The husband, therefore, as well as the wife, was adjudged to be entitled to the benefit of these uses for life, *Ibid.*
7. Infants may contract by marriage articles or settlements, and such contracts will bind them when of full age, *Ibid.*
8. The law has entrusted the father or guardian with the marriage of infant children or wards; and, consequent-

- ly, settlements made by infants through the father or guardian are binding. *Tabb and others v. Archer and others*, 400
9. A recital in marriage articles, stating it to be the intention of the parties to settle ALL the real and personal estate of the wife, *except as therein after excepted*; and a part of such estate being omitted in a subsequent specification thereof, recourse may be had to the *excepting clause*, to prevent the *universality of the recital* from being *restricted* (as it otherwise might be) by the *specification*, *Ibid.*
10. In the construction of agreements, the whole must be taken together, *Ibid.*
- County or Corporation Court. *Wilkinson v. Mayo*, 565
4. If the applicant to build a mill state that he is the owner of the land on both sides of the water-course, when in truth he is not, the writ of *ad quod damnum* and inquisition taken upon it, ought to be quashed, *Ibid.*

## MISDEMEANOR.

1. What is the proper process on an indictment or presentment for a misdemeanor, and when a *capias* may be awarded in the first instance. *The Commonwealth v. McCleneghan*, 575

## MARRIAGE.

1. A *parol promise* by a father to his daughter's husband before the marriage, is a sufficient consideration to sustain a *written agreement* made after the marriage, if such written agreement be otherwise sufficient under the statute of frauds. So also, if the marriage be had on the father's request. *Argenbright v. Campbell and Wife*, 144
2. Under what circumstances slaves sent by a father to his child, immediately after marriage, will be deemed a gift in consideration of marriage, and the rights of the child be protected, in opposition to the claims of the creditors of the father, though such child had not been three years in possession. *Moore's Adm'r v. Dawney, &c.* 127

## MILLS.

1. A *supersedeas* to a judgment of a County Court, granting leave to erect a mill, will not lie in behalf of a person, who may be interested, but whose name does not appear as a party in the record of the County Court. *Wingfield v. Crenshaw*, 245
2. Such person should make himself a party to the contest, before the final judgment in the County Court, and then it will be competent to him to carry the case to a superior tribunal, *Ibid.*
3. Controversies concerning mills may be decided at a quarterly term of a

## MISTAKE.

1. A mistake in a writing referring to another, may, in a Court of Equity, be corrected by the writing referred to. *Argenbright v. Campbell and Wife*, 144
2. Is one of the grounds upon which an agreement concerning lands, perfected by a conveyance, &c. may be relieved against in equity. See AGREEMENT, No. 2. and *Vance v. Walker*, 288

## MORTGAGES.

1. All deeds of trust and mortgages of slaves, or other personal estate, are void against creditors and purchasers for valuable consideration, not having notice thereof, unless the same be acknowledged by the party or parties, or proved by three witnesses, and thereupon duly recorded. *Moore's Ex'r v. The Auditor*, 232
2. The Courts of Chancery have jurisdiction in all cases where property taken in execution at the suit of the Commonwealth, is claimed by any person, under a mortgage or deed of trust, *Ibid.*

## W

## NEW PARTIES.

1. Construction of the rule, as to allowing one term to prepare for trial, after new parties are made. *Scott v. Adams*, 501

NIL DEBET.

1. In an action of debt for rent, the defendant, on the plea of *nil debet*, may give in evidence any special circumstance shewing that the rent ought to be apportioned. *Newton v. Wilson*, 470

NOTICE.

1. What circumstances will constitute a person a purchaser with notice. See *Argenbright v. Campbell and Wife*, 144
2. In a suit against a person alleged to be a purchaser *with notice*, it is not sufficient for the defendant in his answer to say that he had no notice of a prior equity at the time of the purchase. It must appear whether he had obtained a conveyance before he received notice of the plaintiff's claim. *Hoover v. Donnelly and others*, 316

NUL'TIEL RECORD.

1. On the plea of, an imperfect minute of a judgment may be admitted in evidence, which had been recorded, by order of Court, the records of the Court having been previously destroyed by fire. *Lyons, Ex'r, &c. v. Gregory*, 237

O

OBLIGATION.

See BOND.

OMISSION.

1. What omissions in marriage articles may be supplied by *parol*, or other evidence *dehors* the articles. See MARRIAGE ARTICLES, No. 3. *Tabb and others v. Archer and others*, 400
2. If the Clerk of the Court of Appeals be directed by the Court to set aside a judgment, and, by misapprehension, the entry of the order be omitted, it may be done at a subsequent term, and the cause redocketed. *Beasley v. Owen*, 449

ORDER.

1. A general acceptance of an order binds the acceptor to the *payee*, by whom the same was taken, *bona fide*, and for a valuable consideration paid by him; notwithstanding the consideration which induced the acceptance afterwards, fails without any fault on the part of the *payee*. *Corbin's Adm'r v. Southgate*, 319

P

PARLIAMENT.

1. Act of 5 Geo. II. c. 7. sect. 1. making *ex parte* affidavits taken in England, evidence to charge the defendant in the colonies, is not obligatory. *Lewis's Ex'r v. Bacon*, &c. 89

PAROL AGREEMENT.

1. Where a parol agreement before marriage, will be a sufficient consideration to sustain a written agreement afterwards; or, if the marriage be had on the father's request. *Argenbright v. Campbell and Wife*, 144

PAROL EVIDENCE.

See EVIDENCE, No. 6. 8, 9.

PARTIES.

1. The person, in office, ought to be made a party to a rule for a *mandamus* to restore a person claiming it: but if it appear from the record that he was apprised of it, and defended his right, it is sufficient. *Dew v. Judges Sweet Springs D. C.* 1
2. Five years' possession of a slave will entitle the plaintiff, in detinue, who had lost the possession, to recover; but without prejudice to those who were not parties to the suit. *Newby's Adm'r's v. Blakey*, 57
3. A *supersedeas* will only lie in favour of a person who is a party to the record in the Court below. *Wingfield v. Crenshaw*, 245

4. In a mill case, a person *interested* should make himself a party, before the final decision, and then he may carry the cause to a superior tribunal. *Wingfield v. Crenshaw*, 245
5. The first purchaser, or his representatives, ought to be made parties to a bill exhibited by a derivative purchaser, against the vendor, for a specific conveyance. *Hoover v. Donnelly and others*, 316
2. If the plaintiff, an executor, declare against an executor suggesting a *de-vastavit* in the *detinet* only, he cannot have a judgment *de bonis propriis*, but *de bonis testatoris* only: to entitle him to judgment *de bonis propriis*, he must declare in the *debet* and *detinet*. *Spotswood v. Price*, &c. 123
3. The declaration must contain a direct and positive averment; if, therefore, the plaintiff in trespass declare "for that *whereas*," &c. it is error, and will not be cured by verdict. *Moore's Adm'r v. Dawney*, &c. 127

## PERJURY.

1. What is proper evidence to support the plea of justification in an action for slander; the declaration charging the defendant with having said that the plaintiff was guilty of *perjury*, "for which he would have his ears." *Kirtley v. Deck*, 388. See EVIDENCE, No. 6.
2. Note the diversity between perjury at the common law and statutory perjury. *Ibid.*
4. So, in case for a tort; if the declaration continue by way of recital to the end. *Lomax v. Hord*, 271
5. If an administrator declare (in trespass) that the defendant, with force and arms, entered *his* (the plaintiff's) close, and took therefrom certain slaves belonging to the estate of his intestate, it will be intended, after verdict, that the trespass was committed on the plantation of the intestate, and that the plaintiff was in possession for the purpose of finishing the crop, by virtue of the act of Assembly, (1 Rev. Code, p. 166.) *Moore's Adm'r v. Dawney*, &c. 127

## PERSONAL ESTATE.

1. Three witnesses, or the acknowledgment of the party in Court necessary in deeds of trust or mortgages of. See *Moore's Ex'r v. The Auditor*, 232
6. An action cannot be maintained by a mercantile company on a bond payable to A. F. individually, without averring in the declaration, the said bond to have been given to A. F. for their use, or to have been assigned to them by A. F. or by his legal representatives. *Gordon et al. v. Brown's Ex'r*, 219

## PETITION.

1. See COMMONWEALTH, No. 2.
2. A bill exhibited in the High Court of Chancery against the Attorney-General as representing the Commonwealth, but not requiring him to answer on oath, was, in this case, received as equivalent to a petition to that Court. *The Attorney-General v. Turpin*, 548
7. The assignee of a bond cannot sue as obligee, but must set forth the assignment in his declaration. *Ibid.*
8. Appearance and pleading to the action cures all errors in the process. *Turberville v. Long*, 309
9. See JURISDICTION, No. 4. *Ibid.*
10. See WRIT OF RIGHT, No. 1, 2, 3, 4. *Ibid.*

## PLEADING.

1. If there be two counts in a declaration, the one commencing in *covenant* and ending in *case*, and the other *entirely in case*, to which the defendant pleads that he "had not broken the *covenants*;" after general verdict for the plaintiff, judgment will be arrested and a repleader awarded, there being no issue on the second count. *Terrelle v. Page's Adm'r*, 118
11. How the fact of being a subsequent purchaser without notice, must be stated in the answer. See PURCHASERS, No. 5.
12. In case for slander, if the defendant plead the word "*justification*," only, and the plaintiff reply generally, a verdict for the defendant should be set aside, and a repleader awarded; but a verdict for the plaintiff ought not to be set aside, it being a rule, that "a repleader is not grantable in

"favour of the person who made the  
"first fault in pleading." *Kirtley v.*  
*Deck*, 388

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1. Five years' possession of a slave will entitle a plaintiff, in detinue, who has lost the possession, to recover; but without prejudice to the titles of those who were not parties to the suit. *Newby's Adm'r v. Blakey*, 57
2. What possession of slaves sent by the father to the husband of his daughter, immediately after the marriage, will be sufficient to protect the rights of the representatives of the son-in-law, in opposition to the claims of the father's creditors. *Moore's Adm'r v. Dawney, &c.* 127

# POSTSCRIPT.

## See REVOCATION.

1. The cancelling a will does not necessarily cancel a *postscript* thereto, by which all former wills were revoked. *Bates v. Holman*, 502
- Parol evidence is admissible in such cases to shew the situation of the testator, and *quo animo* the cancellation was made, *Ibid.*

# PRACTICE.

## See RULES. PROCESS, No. 3.

1. If a suit in Chancery abate by the death of the defendant, *after answer filed*, and the cause set for hearing; it *seems* that the executor cannot regularly demur to the equity of the bill, or plead any matter which his testator might not have pleaded in that stage of the proceedings; but, if no objection be made to a demurrer filed, and the parties proceed to take depositions, it will be an implied waiver of any objection to such irregularity. *Pope, &c. v. Towles, &c.* 47
2. If the defendant in equity plead the statute of limitations, and the complainant come within any of the exceptions of the act, he will not be entitled to the benefit thereof, unless he set it forth by a replication. *Lewis's Ex'r v. Bacon, &c.* 89

3. The Court of Appeals, or any *Judge out of Court*, may grant an appeal from, or writ of *supersedeas* to, a decree of a Superior Court of Chancery, at any time within three years after such decree was pronounced, notwithstanding the act of 1807. *Tomlinson v. Dilliard, and Mackey v. Bell*, 199
4. An appeal having abated at the *March* term, by the death of the appellant, a *scire facias* to revive it, may be awarded at the ensuing *October* term. *Buster v. Wallace*, 217
5. Where the judgment of a District Court, reversing that of a County Court, is not in its nature final, but remands the cause for further proceedings; and the subsequent judgment of the County Court is also reversed by the District Court; the Court of Appeals, if the *original judgment* of the County Court be correct, will reverse all the subsequent judgments, and affirm that *original judgment*. *Lyons, Ex'r, &c. v. Gregory*, 237
6. Appearance and pleading to the *action* cures all errors in the process. *Turberville v. Long*, 309
7. See WRIT, No. 2. and *Ibid.*
8. See CORPORATION COURTS, No. 1. *Ibid.*
9. See WRIT OF RIGHT, No. 1, 2, 3, 4. *Ibid.*
10. It is a rule that a Repleader is not grantable in favour of the party who made the first fault in pleading. *Kirtley v. Deck*, 388
11. See SLANDER, No. 1. *Ibid.*
12. See APPEALS, COURT OF, No. 3, as to rectifying clerical omissions, at a subsequent term.
13. Construction of the rule as to allowing one term to prepare for trial, after new parties are made. *Scott v. Adams*, 501
14. Where the appellee dies, the Court will not take up the appeal, in the name of his executors, without giving the appellant notice by a *scire facias*, especially where a great length of time has elapsed since the appeal. *Ibid.*
15. See MILLS, No. 4. and *Wilkinson v. Mayo*, 565
16. RULES OF, in the Supreme Court of Appeals. See vol. I. p. 1, 2, 3, 4. and 409. Vol. II. p. 587. Vol. III. p. 269, 270.
17. RULES OF, in the Superior Court of Chancery for the *Richmond* District. See Vol. I. p. 5, 6, 7, 8. and 19. Vol. II. p. 1, 2.



## PRESENTMENT.

1. What is the proper process on an indictment or presentment for a misdemeanor. *The Commonwealth v. M'Clenegan*, 575

## PROCESS.

1. If the original writ be lost, so that it cannot be made a part of the record, the Court will intend, after verdict, that it was a good writ, though some of the subsequent process be erroneous. *Turberville v. Long*, 309
2. Appearance and pleading to the action cures all errors in the process, *Ibid.*
3. What process ought to be awarded upon an indictment or presentment for a misdemeanor. *The Commonwealth v. M'Clenegan*, 575

## PURCHASER.

See MARRIAGE, No. 1. SLAVES, No. 3. and *Moore's Adm'r v. Dawney*, &c. 127

1. A. being in treaty for the purchase of a tract of land offered for sale by J. C. was informed by A. C. that he had a claim to it. A. C. also inserted in a newspaper, an advertisement, cautioning all persons against purchasing, and caused to be recorded a bond of J. C. binding himself not to revoke a will, in which he had devised the land in question to the wife of A. C. which bond was also shewn to A. before he concluded the purchase. These circumstances were sufficient to constitute A. a purchaser with notice, notwithstanding, having seen the will, he had discovered a misrecital of it in the bond, and was advised that he might safely purchase. *Argenbright v. Campbell and Wife*, 144
2. Not affected by a deed of trust or mortgage of slaves or personal estate, (not having notice,) unless the same be proved by three witnesses, or acknowledged by the party, and duly recorded. See *Moore's Ex'r v. The Auditor*, 232
3. See AGREEMENT, No. 2. and *Vance v. Walker*, 288
4. If a derivative purchaser, by assignment of a title-bond, file his bill

against the vendor, for a specific conveyance, the first purchaser or his representatives ought to be made parties. *Hoover v. Donnelly and others*, 316

5. In a suit against a person alleged to be a purchaser with notice, it is not sufficient for the defendant in his answer to say, that he had no notice of a prior equity at the time of the purchase. It must appear whether he had obtained a conveyance before he received notice of the plaintiff's claim, *Ibid.*
6. See EQUITY. SPECIFIC PERFORMANCE. FORFEITURE, and *Jones's Devises v. Roberts*, 436
7. The children born of the marriage are purchasers, under both father and mother, by virtue of marriage articles: yet, upon the death of father and mother, they take (where the limitation is to the issue generally) as coparceners per stirpes, and not per capita. *Tabb and others v. Archer and others*, 400

8. The husband and wife are both purchasers, on the marriage, for valuable consideration, and neither can be deprived of any legal right accruing by the marriage, except such as (according to a just and liberal construction of the articles) each must be understood and intended to have given up, *Ibid.*

## Q

## QUOD CUM.

1. In trespass, ill after verdict. *Moore's Adm'r v. Dawney*, &c. 127
2. So, in case for a tort. *Lomax v. Hord*, 271

## QUARTERLY COURTS.

1. Of the County and Corporation, may exercise all the general jurisdiction of the Courts, as to probate of deeds, wills, &c. controversies about mills, &c. but, at a monthly session, they cannot take jurisdiction of any subject expressly and exclusively assigned to a quarterly term. *Wilkinson v. Mayo*, 565

R

REAL ESTATE,

1. Should be estimated in judging of the sufficiency of security. *Dew v. Judges Sweet Springs D. C.* 1

RECITAL.

1. A recital in marriage articles, stating it to be the intention of the parties to settle ALL the real and personal estate of the wife, *except as therein after excepted*, and a part of such estate being omitted in a subsequent specification thereof, recourse may be had to the *excepting clause* to prevent the *universality* of the recital from being *restricted* (as it otherwise might be) by the *specification*. *Tabb and others v. Archer and others*, 400

RECORD.

1. The declaration charging the defendant with having said that the plaintiff, as a witness before a Court of Record, was guilty of perjury, "for which he would have his ears," a copy of the record of that trial ought to be produced as evidence in support of the plea of justification. *Kirtley v. Deck*, 388. See EVIDENCE, No. 6.

RECORDS.

1. Where the records of a Court have been destroyed, an *imperfect* minute of a judgment may be admitted to record under the act of Assembly, in lieu of the original; provided the *substantial* parts thereof appear; and the record of such minute, made by order of the Court, is good evidence on a plea of *nul tiel record*; although the Clerk failed to indorse upon it that the original was lost or destroyed, and also failed to make an entry to the same effect on the record book. *Lyons, Ex'r, &c. v. Gregory*, 237

RENT.

1. Interest is not recoverable, by way of damages, in an action of debt for VOL. III.

rent-arrear. *Cooke v. Wise*, 463.  
*Newton v. Wilson*, 470

2. Under what circumstances a subsequent lease, made by the landlord, of demised premises in the occupation of the assignee of a residue of the term, will not be deemed an eviction of the *lessee*, nor bar the landlord from recovering of him a balance due for rent on the original contract. *Cooke v. Wise*, 463
3. In an action of debt for rent, the defendant, on the plea of *nil debet*, may give in evidence any special circumstance shewing that the rent ought to be apportioned. *Newton v. Wilson*, 470

4. A lease was made of a mill, together with a tract of land adjoining, and a black man as miller, for a term of years, rendering an annual rent; the miller had, previously to the lease, been emancipated by the lessor by a deed entered of record, and, before the expiration of the first year, left the service of the lessee. It was held that the lessee was entitled to an apportionment of the rent, *Ibid.*
5. The acceptance of rent after a forfeiture accrued, is an equivocal act, and may, or may not, amount to a waiver of the forfeiture, according to the *quo animo* with which the rent was received. *Jones's Devises v. Roberts*, 436

REPLEADER.

1. It is a good ground for arresting judgment and awarding a *repleader*, after a general verdict for the plaintiff, that there were two counts in the declaration; the one beginning in *covenant*, and concluding in *case*; and the other *entirely in case*; to which the defendant pleaded, only, "that he had not broken the covenants." *Terrells v. Page's Adm'r*, 118
2. It is a rule that a repleader is not grantable in favour of the party who made the first fault in pleading *Kirtley v. Deck*, 388

REPLICATION,

1. Special, must be filed to the defendant's plea of the statute of limitations, in equity, if the plaintiff come 4 G

within any of the exceptions of the act, otherwise he will not be entitled to the benefit of such exceptions.

- Lewis's Ex'r v. Bacon, &c.* 89
2. If the record of proceedings on a writ of right state, that the demandant "replied generally," the Court will intend, after verdict, that a general replication was filed in writing. *Turberville v. Long,* 309

### REVALUATION.

1. Where, by the consent of the original owner, part of the land taken for public use was directed, by a law, to be revalued and restored to him, and the residue to be retained by the Commonwealth; but, through the default of the agents of the Commonwealth, such revaluation has not been made; the Court of Chancery should direct it now to be made, and decree the value so ascertained, (of the residue,) with interest, from the time when such revaluation ought to have taken place, to be paid by the Commonwealth to such original owner. *The Attorney-General v. Turpin,* 548

### REVOCATION.

- A testator made a will, in due form of law, to which he afterwards subjoined a codicil; he then made a second will, and annexed a postscript to it, by which he "revoked all former wills," and signed the postscript; the second will was cancelled by cutting his name out from the body of it, but leaving the postscript with his name subjoined to it. This paper was carefully preserved by the testator, as also his first will; both of which were found after his death. Held that the postscript to the second will was a substantive revocation of the first will, and that the cancelling of the second will did not necessarily cancel the postscript also, so as to set up the first as the will of the testator. *Bates v. Holman,* 502
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### S

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1. The act of 1792, for limiting the time within which a *scire facias* may be issued, (1 *Rev. Code*, p. 108. sect. 5.) did not apply to a *scire facias* previously sued out, by leave of the Court, to revive a judgment which was more than ten years old when such leave was given. *Lyons, Ex'r, &c. v. Gregory,* 237
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1. A person appointed a Clerk of a District Court in vacation, had the whole of the ensuing term to give bond and security. *Dew v. Judges Sweet Springs D. C.* 1
2. In judging of the sufficiency of securities, their *real* as well as *personal* estate should be considered, *Ibid.*

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2. Infants may contract by marriage articles or settlements, and such contracts will bind them when of full age. *Tabb and others v. Archer and others*, 400
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3. A father possessed of an ample fortune, having sent certain of his slaves, immediately after the marriage of one of his daughters, to her husband, in whose possession they remained, without interruption or claim, until his death, which happened two years and four months afterwards, it will be presumed, (no proof of fraud appearing,) that such slaves, being no more than a reasonable provision for the daughter at the time, were a gift in consideration of the marriage; and the right of the representatives of the husband is good against the creditors of the father, *Ibid.*
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3. In what manner a Court of Equity will compel performance of marriage articles. See MARRIAGE ARTICLES, No. 2.

## STATUTES, EXPOSITION OF.

1. Of the act (1 *Rev. Code*, p. 192. sect. 47, 48.) as to fraudulent gifts of slaves. *Moore's Adm'r v. Dawney*, &c. 127
2. The true construction of the 29th section of the act reducing into one the several acts concerning the High Court of Chancery (1 *Rev. Code*, p. 66.) is, that, if it appear from the face of the bill, that the matter charged is not proper for a Court of Equity, it ought to be dismissed, even "after answer filed, and noplea in abatement to the jurisdiction of the Court." *Pollard v. Patterson's Adm'r*, 67
3. Construction of the act of the 14th of January, 1807, sect. 4. (2 *Rev. Code*, 128.) as to granting appeals, and awarding writs of error or superseas. *Tomlinson v. Dilliard*, and *Mackey v. Bell*, 199
4. Construction of the act of 1785, (1 *Rev. Code*, p. 170. sect. 19.) as to the legitimation of children born out of wedlock, where parents afterwards intermarry, and recognise them; and of the issue of marriages deemed null in law. See *Rice et al. v. Eford et al.* 226. and *Stones v. Keeling*, 228. note, and *Sleigh v. Strider*, 229. note.
5. Construction of the act concerning the number of witnesses requisite to a deed of trust or mortgage, (1 *Rev. Code*, p. 156, 157. sect. 1. and 4.) compared with the statute of frauds, (1 *Rev. Code*, p. 15, 16. sect. 2.) *Moore's Ex'r v. The Auditor*, 232
6. As to recovery of debts due from the Commonwealth, the lien created by the claim of the Commonwealth, and the jurisdiction of the Courts of Chancery. (1 *Rev. Code*, ch. 84. p. 134. &c. sect. 9, 10. 17. 22. 31.) *Ibid.*
7. Construction of the act for suing out writs of *scire facias*, upon judgments of more than ten years' standing. (1 *Rev. Code*, p. 108. sect. 5.) *Lyons, Ex'r, &c. v. Gregory*, 237
8. As to renewing records, where the originals had been destroyed by fire. (1 *Rev. Code*, p. 38.) *Ibid.*
9. As to docking entails, by writ of *ad quod damnum*, (L. V. edit. 1769, p. 145. 146.) the tenant not being seised. See ESTATES-TAIL. *BASE PER*, and *Gleeson's Heirs v. Stott and others*, 278
10. Construction of the act of frauds, as to loans of slaves or personal estate. (1 *Rev. Code*, p. 15.) *Beasley v. Owen*, 449
11. Of the 6th section of the act concerning the Auditor, as to claims against the Commonwealth. *The Attorney-General v. Turpin*, 548
12. See PETITION, and *Ibid.*
13. See SLAVES, No. 2, 3, 4, 5.

## STATUTE OF FRAUDS.

1. Construction of, as to loans of slaves. *Beasley v. Owen*, 449
2. W. H. by his will, dated in 1789, gave a slave, then in possession of his son-in-law W. B. to his two grandsons I. B. and E. B. (sons of the said W. B. and at that time infants,) as soon as they should come to lawful age: in 1792, he verbally lent the slave to his said son-in-law, "for the purpose of assisting in the maintenance of his children," reserving the right to take him back whenever he should think proper; and, in 1796, four years afterwards, died; in the same year, his will was admitted to record, the surviving grandchild being still under age; in 1801, when that grandchild attained his full age, the slave was taken in execution, and publicly sold as the property of W. B. It was held that the recording of the will, in 1796, was a sufficient declaration, within the meaning of the statute of frauds, to protect the right of the grandchild, in opposition to the claims of the creditors of the father, *Ibid.*

SUBPENA.

1. See ACTION, No. 5. *Moore v. Chapman*, 260

SUPERSEDEAS,

1. May be granted by the Court of Appeals, or any Judge thereof, within three years, notwithstanding a vacation has passed. *Tomlinson v. Dilliard*, and *Mackey v. Bell*, 199
2. A *supersedeas* to a judgment of a County Court granting leave to erect a mill, will not lie in behalf of a person who may be interested, but whose name does not appear as a party in the record of the County Court. *Wingfield v. Crenshaw*, 245
3. Such person should make himself a party to the contest before the final decision in the County Court, and then it is competent for him to carry the case to a superior tribunal, *Ibid.*
4. A *supersedeas* is the proper remedy, only, where the error is apparent on the face of the proceedings, and where the person seeking to reverse the judgment is a party in the Court below, *Ibid.*

SURVEY.

1. A count, on a writ of right, referring to boundaries, as by a survey made in the cause, sufficiently describes the boundaries of the land in dispute. *Turberville v. Long*, 309

T

TITLE.

1. A decree of a County Court that a defendant residing within its jurisdiction, shall convey lands lying within another county, can be enforced on the person of the defendant only; but does not of itself vest any legal title; if offered as evidence of such, on the trial of an ejectment, it ought to be rejected. *Aldridge et al. v. Giles et al.* 136

TITLE-BOND.

1. Who ought to be parties to a bill, for a specific conveyance, brought by the assignee of a title bond. *Hoover v. Donnally and others*, 316

TRESPASS.

1. The gist of the action must, in all cases, be directly and positively alleged, in the declaration; if, therefore, in trespass, the plaintiff declare, "for that whereas," &c. and do not make a positive averment, it is error, and will not be cured by verdict. *Moore's Adm'r v. Dawney, &c.* 127
2. So, in trespass on the case for a tort, if the declaration continue by way of recital, to the end. *Lomax v. Hord*, 271
3. An action of trespass lies against the High Sheriff for the tortious act of his deputy. *Moore's Adm'r v. Dawney*, 127
4. An administrator who declares in trespass, for breaking his close and taking away slaves belonging to the estate of his intestate, will, after verdict, be intended to have been in possession, for the purpose of finishing the crop, by virtue of the act of Assembly, *Ibid.*
5. See FALSE IMPRISONMENT, No. 1.

TRUST, DEEDS OF.

1. All deeds of trust and mortgages of slaves, or other personal estate, are void against creditors and purchasers for valuable consideration not having notice thereof, unless the same be acknowledged by the party or parties, or proved by three witnesses, and thereupon duly recorded. *Moore's Ex'r v. The Auditor*, 232
2. The Courts of Chancery have jurisdiction in all cases, where property taken in execution at the suit of the Commonwealth, is claimed by any person under a deed of trust or mortgage, *Ibid.*

TRUSTEES.

1. A Court of Equity will compel performance of marriage articles by



appointing trustees where none were inserted in the articles, and decreeing a settlement. See MARRIAGE ARTICLES, No. 2. *Tabb and others v. Archer and others*, 400

## TRUST ESTATE.

1. Before our act of Assembly, (of 1785, which took effect the 1st of January, 1787,) giving a widow dower of a trust estate, she could not be endowed of an equitable estate. *Claiborne and Wife v. Henderson*, 321

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## USES, DECLARATION OF.

1. It having been agreed, by marriage articles, that all the estate, real and personal, of the wife, should remain in her right and possession during the marriage, and that the profits only should be applied to the support of the husband and wife, and their issue, if any; and it having been further agreed, that the husband would never sell or dispose of any part of the said estate, but that the same should always be held as an inviolable fund for the support of the said husband and wife and their issue, if any there should be; the first clause was construed as containing a declaration of the uses of the estate during the coverture only; and the second clause as declaring the uses afterwards. The husband, therefore, as well as the wife, was adjudged to be entitled to the benefit of these uses for life. *Tabb and others v. Archer and others*, 400

## V

## VALUATION MONEY.

1. The lawful emanation, execution, and return of a writ of *ad quod damnum* to value land intended to be applied to public uses, immediately divests the title of the individual owner to the land so valued, and transfers it to the Commonwealth in full and absolute dominion; such owner remaining entitled only to the valuation money and damages assessed by the Jury. *The Attorney-General v. Turpin*, 548

2. Interest is not to be allowed on such valuation money or damages, unless the claimant applied to the Auditor for his warrant, and was refused it; or, having obtained it, was refused payment at the Treasury, *Ibid.*

3. See REVALUATION.

## VARIANCE.

1. What variance between a judgment and the recital thereof, in a *scire facias*, or in the judgment thereupon, is not material. *Lyons, Ex'r, &c. v. Gregory*, 237

## VENDOR AND VENDEE.

1. If a derivative purchaser, by assignment of a title-bond, file his bill against the vendor, for a specific conveyance, the first purchaser or his representatives ought to be made parties. *Hoover v. Donnelly and others*, 316
2. See PURCHASER, No. 5. and *Ibid.*

## VERDICT.

1. Will not cure the want of a positive averment in the declaration, in an action on the case for a tort. *Lomax v. Hord*, 271
2. After verdict, it will be intended that an administrator, who declares for breaking his close, and taking away slaves belonging to his intestate, was in possession for the purpose of finishing the crop, by virtue of the act of Assembly. *Moore's Adm'r v. Dawney, &c* 127
3. So, in assault and battery, after verdict, on the pleas of, "not guilty," and "son assault demesne," judgment ought not to be arrested, on the ground that the time was left blank in the declaration. *Digges v. Norris*, 268
4. If the verdict and judgment on a writ of right be substantially right, though not in the words of the law, they ought not to be disturbed. *Turberville v. Long*, 309
5. See SLANDER, No. 1. *Kirtley v. Deck*, 388
6. Though the verdict be for more damages than are laid in the declaration, yet, if the damages were laid

high enough in the writ, the judgment will be sustained. *Palmer and Eubank v. Mill*, 502

W

"WHEREAS,"

1. In *trespass*, ill after verdict ; if the declaration continue by way of recital to the end. *Moore's Adm'r v. Dawney, &c.* 127
2. So, in case for a tort. *Lomax v. Hord*, 271

WIFE.

1. Where husband and wife sue, in right of the wife, for a title to a tract of land, the conveyance should be decreed to be made to the wife only. *Argenbright v. Campbell and Wife*, 144

WILLS.

1. W. H. by his will, dated in 1789, gave a slave, then in possession of his son-in-law, W. B. to his two grandsons I. B. and E. B. (sons of the said W. B. and at that time infants) as soon as they should come to lawful age : in 1792, he verbally lent the slave to his said son-in-law, " for the purpose " of assisting in the maintenance of " his children," reserving the right to take him back whenever he should think proper ; and, in 1796, four years afterwards, died : in the same year, his will was admitted to record, the surviving grandchild being still under age : in 1801, when that grandchild attained his full age, the slave was taken in execution, and publicly sold as the property of W. B. It was held, that the recording of the will, in 1796, was a sufficient declaration, within the meaning of the statute of frauds, to protect the right of the grandchild in opposition to the claims of the creditors of the father. *Beasley v. Owen*, 449
2. A testator made a will, in due form of law, to which he afterwards subjoined a codicil ; he then made a second will, and annexed a postscript to it, by which he " revoked all former " wills," and signed the postscript ; the second will was cancelled by cutting his name out from the body of it, but leaving the postscript with

his name subjoined to it. This paper was carefully preserved by the testator, as also his first will ; both of which were found after his death. Held that the *postscript* to the second will was a substantive revocation of the *first will*, and that the cancelling of the *second will* did not necessarily cancel the *postscript* also, so as to set up the *first*, as the will of the testator. *Bates v. Holman*, 502

3. Parol evidence is admissible in such cases, to shew the situation of the testator, and *quo animo* the cancellation was made, *Ibid.*

WITNESSES.

1. A deed of trust or mortgage for slaves, or other personal estate, is void against creditors and purchasers for valuable consideration not having notice thereof, unless the same be acknowledged by the party or parties, or proved by three witnesses, and thereupon duly recorded. *Moore's Ex'r v. The Auditor*, 232
2. The declaration charging the defendant with having said that the plaintiff, as a witness before a Court of Record was guilty of perjury, " for which he " would have his ears," the defendant, on the plea of justification, cannot give *parol* evidence of what the plaintiff swore to, without producing a copy of the record of that trial to shew that the testimony given by the plaintiff was material to the matter in question. *Kirtley v. Deck*, 388

WRIT.

1. After verdict, the *damages* having been left blank in the *declaration*, the Court will inspect the writ, and supply them from it. *Digges v. Norris*, 268
2. If the original be lost, so that it cannot be made a part of the record, the Court will *intend* after verdict, that it was a good writ, though some of the subsequent process be erroneous. *Turberville v. Long*, 309
3. If the damages be laid high enough in the writ, though the Jury find more than are laid in the *declaration*, the writ may be referred to for the purpose of amendment, and the judgment will be sustained. *Palmer and Eubank v. Mill*, 502

## WRIT OF RIGHT.

1. What circumstances are sufficient to cure the omission to mention in the count on a writ of right, the County where the land lies. *Turberville v. Long*, 309
2. A count, on a writ of right, referring to boundaries, *as by a survey made in the cause*, sufficiently describes the boundaries of the land in dispute, *Ibid.*
3. If the record of proceeding on a writ of right state, that the demandant "*replied generally*," the Court will intend, *after verdict*, that a general replication was filed in writing, *Ibid.*
4. The statute of *jeofails* extends to writs of right : therefore, if the verdict and judgment be *substantially right*, though not in the words of the law, they ought not to be disturbed, *Ibid.*

## WRITING.

1. A note or memorandum in writing, within the meaning of the statute of frauds, made at the time, or after, of perfecting an agreement concerning lands, by a conveyance, &c. is one of the grounds to authorise relief against such agreement in a Court of Equity. See AGREEMENT, No. 2. *an Vance v. Walker*, 288













